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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-363

FRANKLIN NIX,

Petitioner

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Ciecuit

---

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

FRANKLIN NIX,

Petitioner,

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, Franklin Nix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fifth Circuit entered in this proceeding on June 5, 1973.

OPINIONS BELOW

The opinion and judgment of the District Court on the trial of the original complaint of Nix v. Fulton Lodge No. 2, IAM, ordering Nix reinstated as a member of the Union after his illegal expulsion is reported at 262 F. Supp. 1000 and appears in the Appendices hereto as Appendix One. The opinion of the Court of Appeals affirming the judgment of reinstatement is reported at 415 F. 2d 212 and appears in the Appendices hereto as Appendix Two.

The opinions of the District Court on the amended complaint brought as a class action against the International are unreported and appear in the Appendices hereto as Appendix A, Appendix B, Appendix C, Appendix D, Appendix E, Appendix F, and Appendix G.

The opinion of the Court of Appeals on a former appeal in this case, and in C.A. No. 13818, is reported at 452 F. 2d 794 and appears in the Appendices hereto as Appendix H. The opinion and judgment of the Court of Appeals sought to be reviewed is unreported and appears in the Appendices hereto as Appendix I.

JURISDICTION

The judgment of the Court of Appeals

for the Fifth Circuit was entered on June 5, 1973. This petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a union member brings a class action against his Union in a District Court seeking a declaration of rights and other legal relations of the class, injunction, attorney's fees and expenses, and all other appropriate relief, and the Court enters a declaratory judgment declaring a provision of the Union's constitution which is being invoked against class members to be invalid as inconsistent with the provisions of 29 U.S.C. § 101 (b), in authorizing union disciplinary proceedings against any union member who exercises his right of free speech granted by 29 U.S.C. § 411 (a) (2), and grants a permanent injunction enjoining any use of such void provision by the Union, makes an interim award of attorney's fees, and denies the demand for "other appropriate relief", and the Court of Appeals affirms the judgment in all respects; whether or not the Court of Appeals erred in affirming such judgment, in holding that Section (c) (4) of Rule 23, F.R. Civ. P. means that the District Court could consider the class claims as "fully one of law" because it is not clear whether plaintiff ever adequately alleged a damage claim on behalf of all

members of the class against the Union, and that it was within the trial judge's discretion to limit the class aspects of this case to the question of the validity of the constitutional provision, in view of the right of plaintiff in a successful declaratory judgment action to seek damages and attorney's fees, as further proper relief based on such declaratory judgment, under 28 U.S.C. § 2202?

2. Whether or not the Court of Appeals erred in affirming the judgment of the District Court granting, under Rule 12 (f) of the F.R. Civ. P., the Union's motion to strike paragraphs 7, 8, 9, 10, 11 and 15 of the class action, alleging malice and bad faith on the part of the Union in using said void provision of its constitution to punish members of the class, and in refusing, after written demand made upon it on behalf of the class, to stop all IAM charges and trials current or in progress on such void provision?

3. Whether or not the Court of Appeals erred in affirming that the District Court was well within its discretion in rejecting "as a series of arguments over the social desirability" of the court awarding a total fee of 2 1/2 million dollars, plaintiff's request that the court, in making its determination of his claim for an interim award of attorney's fees, to consider: the benefits accruing to the IAM and its members, and to the public from the

court's judgment in effectuating the purposes of the LMRDA; the contingent nature of the attorney's fees; the skill and resourcefulness of opposing counsel and the source of their compensation; the effect of the award of a substantial attorney's fee as a deterrent to officers of other unions from disciplining members under constitutional provisions of like import, and in furthering the policy of encouraging private litigation to enforce statutory provisions not otherwise enforceable; the $30,000,000.00 annual income of Grand Lodge from the per capita tax paid by its one million members; and the number of years since the passage by Congress of the LMRDA the Union had thwarted the policy of Congress designed to foster the democratic control of labor organizations by its members; and in setting attorney's fees at $3,000.00 on the basis of other unspecified appropriate factors, with particular emphasis on the court's knowledge of the case and experience, in the absence of specifics as to the time spent on the case by plaintiff's counsel?

4. Whether or not the Court of Appeals erred in affirming the judgment of the District Court without deciding the issues raised by the Statement of the Issues in the brief of Appellant on the appeal, alleging error in the judgment of the District Court entered September 26, 1972: in failing to revoke its judgment granting the motion of the Union to strike paragraphs of

the complaint charging malice and bad faith against the Union; in denying plaintiff's motion for an order determining whether the class action is to be maintained as such; and in failing to reverse its judgment that no notice to members of the class on behalf of whom the class action is brought is required by Rule 23, F.R. Civ. P?

5. Whether or not the Court of Appeals erred in finding from the record before it that "All damage claims for Nix himself were clearly dropped at pre-trial conference", and in basing its judgment affirming the judgment of the District Court upon such erroneous finding?

STATUTORY PROVISIONS INVOLVED

DECLARATORY JUDGMENT ACT:

28 U.S.C. §§ 2201, 2202; 62 Stat. 964

"§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree

and shall be reviewable as such.

"§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined such judgment."

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959:

§ 102 (29 U.S.C. § 412; 73 Stat. 523) and § 609 (29 U.S.C. § 529; 73 Stat. 541)

"Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the violation occurred, or where the principal office of such labor organization is located."

"Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any member thereof to fine, suspend, expel, or otherwise discipline any of its members for

exercising any right to which he is entitled under the provisions of this Act. The provision of section 102 shall be applicable in the enforcement of this section."

FEDERAL RULES OF CIVIL PROCEDURE:

"Rule 12 (f) Motion to Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleadings upon him or upon the court's own initiative at any time, the court may order striken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

"Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudi-

cation of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a

specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repitition or complication in the presentation of evidence or argument; (2)

requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)"

"Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the

members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23 (d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(As added Feb. 28, 1966, eff. July 1, 1966.)"

"Rule 54. Judgments; Costs * * *

"(c) Demand for Judgment. * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

"Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district court or the venue of actions therein."

STATEMENT OF THE CASE

This is an internal union free speech case governed by the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519). Jurisdiction in the District Court is based upon LMRDA § 102, 29 U.S.C. § 412. Civil Action No. 10463 was filed in the District Court for the Northern District of Georgia by Franklin Nix against Fulton Lodge No. 2, IAM, seeking a declaration that statements by Nix concerning one Quick, an officer and member of the union, did not "afford a basis for disciplinary action against him by Fulton Lodge No. 2" and that "the prosecution of plaintiff on such charges by such lodge" violated the rights secured to him by 29 U.S.C. § 411 (a) (2). Nix had been expelled from membership in the union for making such statements, and sought reinstatement to full membership in the union and an injunction enjoining the defendant from further interference with his free speech rights, and damages.

The District Court found that Nix was expelled from membership for the exercise of protected speech and ordered Fulton Lodge No. 2 and its international body, to reinstate Nix to full membership in the union and to refrain from further interference with his free speech rights, and reserved for further consideration the question of compensatory damages to Nix. Nix v. Fulton Lodge No. 2, IAM, 262 F. Supp. 1000.

On appeal by the union, the Court of Appeals for the Fifth Circuit affirmed, except as to the injunction against the international union which it vacated for lack of in personam jurisdiction, holding that Nix was entitled to amend to seek relief against the international, and that he should be given that right if he desired it, and remanded the case for further proceedings. Nix v. Fulton Lodge No. 2, IAM., 415 F. 2d 212 (1969).

Back in District Court, Nix amended by making the International a party, and added a separate claim relating to his dismissal from his job, but later filed notice of dismissal of this amendment to the complaint. Nix then filed a second suit, C. A. No. 13818, against International in said Court, count one of which alleged wrongful, malicious and wanton conduct in administering discipline which resulted in discharge from employment and expulsion from membership. In a second count in C. A. No. 13818, Nix sought a declaratory judgment, injunction, attorney's fees and expenses, and all other appropriate relief, on his own behalf and on behalf of all union members as a class, against International, alleging that a portion of Article L, § 3 of the IAM Constitution which allowed discipline of union members for false or malicious statements against other union members or officers conflicted with the freedom of speech provi-

sions of the LMRDA. The District Court found Nix foreclosed on count one of C. A. No. 13818 because of an earlier determination that his discharge from employment by the union had been proper. As to count two of C. A. No. 13818, the court dismissed it with permission to add it in lieu of the dismissed amended complaint in the original action, and narrowed the class to only those members against whom the union's constitutional prohibition was being applied.

On appeal, the Court of Appeals affirmed that count two could be included by amendment to C. A. No. 10463, stating:

> "This leaves the matter in the posture where the district court can determine, in the event of amendment, as its order contemplates, whether the matter should proceed as a class action at all, depending on whether the requisites of Rule 23, F.R. Civ. P., are met." 452 F. 2d at 797.

Back in the District Court again, a pre-trial conference was held on January 6, 1972 and a pre-trial order was filed on January 21, 1972 stating, in material part:

> "The above case is again before the court for consideration of plaintiff's claims under his right to amend, and his claims

for damages against the local union for his expulsion from membership. Plaintiff's counsel states that plaintiff abandons his claims for damages against the local union.

"Accordingly, the class claims may be made by amendment filed with the court and served upon opposing counsel on or before February 15, 1972. By agreement of counsel, no additional service or notice will be required, and the International Union will be considered a proper party for the class claims. Also by agreement of counsel, the amendment need not be responded to by the defendants, but will be considered denied in every material particular.

"The matter being purely one of law in that plaintiff's contention is that the constitutional provision is void on its face, the matter will be handled by briefs and ruling by the Court. Plaintiff is granted until March 1st to file his brief on the issue presented, and defendant is granted an additional ten days in which to respond. Thereafter, the court will proceed to rule upon the class question."

The class claims amendment was filed on February 8, 1972, and a timely brief for plaintiff. The defendant's response, filed February 28, 1972, consisted of Motions to Dismiss, Motion to Strike and Answer. Paragraph 19 of the Answer stated:

> "19. Defendants further assert that the provisions of Article L, Section 3, complained of are enforced by Local Lodges throughout the United States and Canada and that the defendants have no knowledge of or practical means of ascertaining what cases are pending under such provisions nor the names of the members against whom such cases are pending nor the facts of such cases."

Defendant moved to strike paragraphs of the Amendment alleging bad faith and malice against International and that Fulton Lodge No. 2 was the agent of international in conducting the disciplinary proceedings against plaintiff under said void constitutional provision, and to strike plaintiff's demand for attorney's fees and expenses.

The district court filed its judgment on June 27, 1972 denying defendants Motions to Dismiss, granting the Motions to Strike the allegations asserting malice, bad faith,

etc., against International and the agency relationship between the local lodge and the International, under Rule 12 (f) of the F.R. Civ. P.; denied the motion to strike the demand for attorney's fees and expenses and authorized the submission of claims therefor; granted a declaratory judgment that the union's constitutional provision involved was void, and permanently enjoined its use by the Union. The court also adjudged that at a pre-trial conference with counsel, the plaintiff abandoned his theoretical claim for general damages and limited his class action to the invalidity of Article L, Section 3 on its face. Three motions to alter and amend the judgment were filed by the plaintiff, each resulting in some technical change.

Plaintiff filed a claim for an interim award of attorney's fees against International in the amount of 2 1/2 million dollars based upon his success in obtaining the declaratory judgment and injunction. It was presented in the manner and form usually employed in cases where "fee-shifting" is appropriate, i.e., when the interests of justice so require and overriding considerations indicate the need for such a recovery. The claim requested the court in making the award to consider as appropriate factors, among others: the bad faith of the International; the conferring of a substantial benefit on the members of an ascertainable class so as to spread the costs proportionately among them; the bene-

fit to the public of the role of the plaintiff as a "private attorney general" in vindicating a policy that Congress considered of high priority which is enforceable only by private action; the prophylactic aspect of the award of a substantial attorney's fee in deterring like violations of Congressional policy by other unions; the annual income of the International of $30,000,000.00 from the per capita tax paid by its one million members; and the number of years since the passage of the LMRDA that the International had thwarted the policy of Congress in using said provision of its constitution to prevent democratic control of the union by its members. The District Court rejected the consideration of these factors, characterizing them "as a series of socialogical arguments" why the court should allow the claim. Particularly noting the absence of a statement in affidavit form showing the time spent by plaintiff's counsel on the case, the court considered other unspecified factors, with emphasis upon the court's knowledge of the case and experience, and awarded an attorney's fee of $3,000.00.

The District Court entered its final opinion and judgment on September 26, 1972. Nix filed a timely notice of appeal from said judgment to the United States Court of Appeals for the Fifth Circuit. The material issues which Appellant sought to have determined by the Court of Appeals, as contained in the Statement of the Issues set forth in

Appellant's brief were as follows:

"1. Whether or not the final judgment entered by the district court on September 26, 1972, is erroneous as being contrary to law in each of the following particulars:

(a) In denying plaintiff's motion to alter and amend its judgment entered June 27, 1972, by reversing its judgment that plaintiff has waived his claims for damages to members of the class against Grand Lodge under the terms of the Order entered by the court on January 21, 1972 (App. 3), following PRE-TRIAL conference under this Court's decision in No. 71-1395, and because no claim for damages was made in plaintiff's amendment filed on February 8, 1972 (App. 38).

(b) In denying plaintiff's motion to alter and amend its judgment entered June 27, 1972, filed June 30, 1972 (App. 33), to revoke that portion of said judgment granting Grand Lodge's motion to strike paragraphs 7, 8, 9, 10, 11 and 15 of plaintiff's amendment filed February 8, 1972 (App. 5).

(c) In denying plaintiff's motion for an order determining whether Count II is to be maintained as a

class action, filed August 7, 1972 (App. 41).

(d) In denying plaintiff's motion filed August 7, 1972 (App. 40), to alter and amend its judgment entered July 27, 1972, by reversing said judgment with respect to the matter of no notice to members of the class on behalf of whom Count II of the amended complaint is brought being required by Rule 23, F.R. Civ. P.

2. Whether or not the district court, sitting as a court of equity, abused its discretion to the extent of manifest disregard of right and reason, in awarding only $3,000.00 attorney fees to plaintiff, where the record shows admissions by the Grand Lodge of wilful and persistent violations by it of § 609 of the LMRDA (29 U.S.C. §529) by disciplining its members for exercising their rights of free speech, in view of the equitable principles and purposes for which an award of attorney's fees are authorized to be made to a successful plaintiff, serving in the capacity of a "private attorney-general" in litigation, who has obtained a judgment establishing a violation of federal law, thereby effectuating a strong congressional policy and bringing benefits both

to the general public and to other beneficiaries of the litigation, including the Grand Lodge.

3. Whether or not the interim award of the district court, sitting as a court of equity, of $3,000.00 attorney fee to plaintiff against Grand Lodge is inequitable, as being contrary to justice and reason, because it is so niggardly, inadequate and unreasonable as to constitute a breach of duty by the district court to fashion appropriate remedies under § 102 of the LMRDA (29 U.S.C. §412) to carry out the purposes of the statute and the policies therein adopted, and because such award is insufficient to effectuate such policy in this extraordinary case, where the overriding considerations indicate the need for the reward of a substantial attorney's fee to plaintiff against Grand Lodge, if such fee is to meet the standard of an effective remedy intended to encourage private suits for the enforcement of Congressional policies, in instances where such policies may be enforced by means of private suits, but not otherwise.

4. Whether or not the district court, sitting as a court of equity, manifestly abused its judicial dis-

> cretion in making an award of only $3,000.00 as attorney's fee to plaintiff against Grand Lodge, predicated upon the fact that plaintiff's claim for attorney's fee did not show a statement of the time spent by the attorney, and in failing to consider the nine (9) factors which plaintiff requested the court to consider in determining a reasonable attorney's fee, as requested in plaintiff's claim for attorney's fee, filed August 8, 1972 (App. 45-47), and in characterizing said factors as "a series of arguments over the social desireability" of awarding a total fee of 2-1/2 million dollars."

The Court of Appeals ruled adversely to Appellant on 1 (a); failed to pass upon 1 (b), 1 (c), and 1 (d); and ruled adversely to Appellant on 2, 3 and 4, and affirmed the judgment of the District Court in all respects.

REASONS FOR GRANTING THE WRIT

The issuance of a writ of certiorari to review the decision of the court below is sought upon the cumulative bases that: (1) the court below has so far sanctioned departure of the district court from the accepted and usual course of judicial pro-

ceedings as to call for an exercise of this Court's power of supervision; (2) the decision of the court below conflicts with its own prior decisions and with the decisions of other courts of appeals; (3) the court below has decided a federal question in a way in conflict with applicable decisions of this Court; and (4) the court below has decided important questions of federal law which have not been, but should be settled by this Court.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is important to the administration of justice that litigants in federal courts be afforded the opportunity to seek the full measure of relief which Acts of Congress entitle them to seek. In the LMRDA of 1959, Congress adopted a labor policy designed to foster the democratic control of labor organizations by their members. In § 102 of the Act (29 U.S.C. § 412), the enforcement of that policy was placed upon the union member whose rights were infringed, by means of a private civil action in a district court for such relief (including injunctions) as may be appropriate. Section 102 was intended to afford the courts a wide latitude to grant relief according to the necessities of the case, and to give such relief as the court deems equitable in all the circumstances.

A decision by this Court of the

questions presented in this petition will be important to all labor organizations, their millions of members, to attorneys who represent aggrieved union members unable to finance litigation, and to the public in the effective enforcement of Congressional policy.

Section (c) (4) of Rule 23, F.R. Civ. P.

The Court of Appeals construed Section (c) (4) of Rule 23, F.R. Civ. P. as authorizing the district court to limit the class aspects of this case to question of the validity of the constitutional provision "because it is not clear whether plaintiff ever adequately alleged a damage claim on behalf of all members of the class against the Union".

If this construction of Section (c) (4) of Rule 23 is permitted to stand, it will constitute judicial repeal of 28 U.S.C. § 2202, providing that further relief based on a declaratory judgment may be granted after reasonable notice and hearing against adverse party whose rights were determined by the judgment. 28 U.S.C. § 2202 has been construed to mean that

> "the further relief sought - here monetary recompense - need not have been demanded, or even proved, in the original action for declaratory relief. The section authorizes further or new relief based on the

> declaratory judgment, and any additional facts which might be necessary to support such relief can be proved on the hearing provided in the section or in an ancillary proceeding if that is necessary." Edward B. Marks M. Corp. v. Charles K. Harris M. P. Co., (2nd Cir. 1958) 255 F. 2d 518, 522, cert. denied 358 U.S. 831. Cf. Security Ins. Co. of New Haven v. White, (10th Cir. 1958) 236 F. 2d 215, 220; Teas v. Twentieth Century-Fox Film Corp., (5th Cir. 1969) 413 F. 2d 1262, 1266.

The purpose of Section (c) (4) of Rule 23 was to give flexibility to the court in the management of a class action, after the determination of the predominating common question by declaratory judgment. It does not authorize the court to terminate the litigation as a class action after the declaration of rights so as to preclude members of the class from asserting and proving their individual claims for damages and other relief based on the declaratory judgment.

> "The theory of Rule 23 (c) (4) is that the advantages and economics of adjudicating issues that are common to the entire class on a representative basis should be secured even though

> other issues in the case may have to be litigated separately by each class member * * * As a result, cases have applied subdivision (c) (4) (A) to allow a partial class action to go forward and have left questions of reliance, damages, and other issues to be adjudicated on an individual basis."
>
> Wright & Miller, Federal Practice and Procedure: Civil § 1790, and cases cited in note 64 on page 188.

It seems clear from the provisions of 28 U.S.C. § 2202 that applications for further necessary and proper relief based upon a declaratory judgment, were to be sought in the declaratory judgment proceeding. To require each individual member of the class in a class action to file independent suits to obtain such relief would be inconsistent with the purposes for which class actions are allowed. Class aspects of a class action for declaratory judgment are not fully disposed of as long as members of the class have a right to further relief based on such declaratory judgment.

Petitioner contends that the Court of Appeals erred in holding that it was within the trial judge's discretion to limit the class aspects of this case to the question of the validity of the constitutional provision.

ALLEGATIONS OF MALICE AND BAD FAITH AGAINST UNION IMPROPERLY STRICKEN UNDER RULE 12 (f) F.R. CIV. P.

The Court of Appeals erred in affirming the judgment of the district court granting, under Rule 12 (f) F.R. Civ. P., the Union's motion to strike allegations of the class complaint charging malice and bad faith against the Union: in using, with knowledge of its invalidity, the void provision of its constitution to punish members of the class; and in refusing, after written demand to do so, to stop all IAM charges and trials current or in progress on such void provision against its members.

These allegations were neither redundant, immaterial, impertinent, or scandalous, and Rule 12 (f) does not authorize the striking of such allegations. They are allegations which are material and pertinent to the demand for attorney's fees sought in the complaint.

In the recent case of Hall v. Cole, No. 72-630, decided May 21, 1973, 36 L. Ed. 2d 702, an action brought under § 102 of the LMRDA, 29 U.S.C. 412, this Court said:

> "Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or

> for oppressive reasons'. (Citations omitted). In this class of cases, the underlying rationale of 'fee-shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." (emphasis ours).

In Kerr v. Screen Extras Guild, Inc., (9th Cir. 1972) 466 F. 2d 1267, the Court of Appeals remanded the case to the district court to reconsider an application for attorney's fees in an action brought under § 102 of the LMRDA, 29 U.S.C. § 412. At page 1270 the Court said:

> "Although the trial court expressed the view that, if it had the power to award litigation expenses, it would exercise its power to deny them here, we think that Kerr is entitled to reconsideration of the issue on remand. Because the court was convinced that § 412 deprived it of the power to grant litigation expenses, it may not have given adequate attention to the equitable considerations which determine whether an award should be made or not. For example, the court refused to permit plaintiff's attorney to prove that defendant had acted

> with malice, a factor which it might have considered important, both on the issue of exemplary damages and on the issue of expenses, including attorney's fees, had it realized that it was empowered to make the award. On remand the district court will exercise its discretion and determine whether Kerr is entitled to recover his litigation expenses. In so doing, the court should take into account the fact that it was only after this action was brought that the defendant decided to stop the conduct complained of." (Emphasis ours).

The foregoing authorities clearly support Petitioner's contention that the Court of Appeals erred in affirming the judgment of the district court granting the Union's motion to strike the allegations of the class complaint charging malice and bad faith against the Union, and in considering attorney's fees in this case to be compensatory and not punitive in nature. (See opinion and judgment of district court, filed August 28, 1972).

EXERCISE OF COURT'S DISCRETION IN AWARDING ATTORNEY'S FEES IS GOVERNED BY ESTABLISHED PRINCIPLES OF EQUITY.

The Court of Appeals erred in affirming the judgment of the district court in awarding an attorney's fee of only $3,000. in this case, and in failing to hold that the district court abused its discretion to the manifest disregard of right and reason in rejecting the consideration of, and characterizing "as a series of sociological arguments" in support of the claim for 2 1/2 million dollars, the established equitable principles requested to be considered by the court in its determination of plaintiff's claim for attorney's fees.

An award of a substantial attorney's fee to plaintiff in this case was justified under established principles of equity: (1) the bad faith of the Union, (2) the conferring of a substantial benefit on the members of an ascertainable class, and (3) under the "private attorney general" theory. The award of $3,000.00 was an abuse of sound judicial discretion because grossly inadequate under the circumstances of this case, and in manifest disregard of right and reason.

Section 102 of the LMRDA places upon the district court a duty to fashion "appropriate relief" according to the circumstances of each case brought under that section. It is the duty of the court to

do equity in each particular situation. The principles of equity which the district court rejected from consideration and characterized "as a series of sociological arguments" in awarding the $3,000.00 attorney's fees, were deemed to be principles of equity appropriate for consideration upon the issue of allowance of attorney's fees in a class action in the case of Angoff v. Goldfine, (C.A. 1,1959), 270 F. 2d 185, and cases cited therein.

In Smolowe v. Delendo Corp. (2 Cir. 1943), 136 F. 2d 231, 241, the court said:

> "Since in many cases such as this the possibility of recovering attorney's fees will provide the sole stimulus for enforcement * * * the allowance should not be too niggardly."

When this case was first before the Court of Appeals in Fulton Lodge No. 2 of IAM v. Nix, 415 F. 2d 212, the Court in footnote 3 at pages 214-215 stated:

> "Provisions such as this, limiting criticism of union members and officers, are not unique to IAM. See the remarks of Senator Goldwater (R-Ariz.) on the Senate floor that, as of 1959, the constitutions of '74 unions limit member criticism of officers and

> fellow members and 15 unions prohibit the issuance of any literature emanating from members unless the consent of national officers is received'."

We wish to direct the Court's attention to Senator Goldwater's remarks in the Congressional Record on May 13, 1959, Volume 105, Part 6, at pages 8029-8031. There he set forth Section 3 of Article K of the IAM Constitution, which became Section 3 of Article L in the Constitution of 1966, as an example of the IAM's suppression of free speech among its members. We have been unable to find in the Legislative History of the LMRDA a verbatim reproduction of the provisions of any other of the 74 union constitutions which were said by Senator Goldwater to limit member criticism of officers and fellow members. Respondent is certainly charged with knowing that Congress acted to grant free speech to all unions members largely because of the use by it of its constitutional provisions permitting it to discipline members who expressed disagreement with the policies of its high officials.

Respondent was thus put on notice by Congress, in its enactment of the LMRDA in 1959, that the interest of the public would best be served by all labor organizations refraining from taking disciplinary actions against their members as reprisals for expressing their views, argu-

ments, and opinions. Respondent was also aware of the construction of the LMRDA concerning the invalidity of such reprisals as held by the Court of Appeals for the Second Circuit in Salzhandler v. Caputo, (1963) 316 F. 2d 445, at 451, as shown in The Grand Lodge of the International Association of Machinists v. King, (C.A. 9,1964) 335 F. 2d 340, cert. denied 379 U.S. 920.

Respondent's conduct in the continued use of said void provision of its constitution to discipline its members for exercising their rights of free speech following the decision of the Court of Appeals in Fulton Lodge No. 2 of IAM v. Nix, (5th Cir. 1969), 415 F. 2d 212, and its continued litigation of the legal issue of its invalidity until harpooned by a declaratory judgment and injunction in this case, has been in bad faith, unreasonable and obdurately obstinate, vexatious, and oppressive.

Petitioner respectfully contends that the Court of Appeals erred in affirming the judgment of the district court rejecting the consideration of, and characterizing "as a series of sociological arguments" the established principles of equity requested to be considered by plaintiff in adjudicating his claim for attorney's fees, as constituting the exercise of a sound judicial discretion under all the circumstances of this case.

ERROR OF COURT OF APPEALS IN REFUSING TO DECIDE MATERIAL ISSUES RAISED ON APPEAL

Petitioner has already discussed his contention that the Court of Appeals erred in refusing to pass upon the alleged error of the district court in refusing to reverse its judgment striking the allegations of the class action charging malice and bad faith against the union.

Two other issues were raised on the appeal that were not decided by the Court of Appeals which Petitioner contends that the court erred in failing to decide: (1) Whether or not the district court erred in denying plaintiff's motion for an order determining whether the class action is to be maintained as such; and (2) Whether or not the district court erred in failing to reverse its judgment that no notice to members of the class on behalf of whom the class action is brought is required by Rule 23, F.R. Civ. P.

Paragraph 17 of the class complaint alleged:

"17

> Plaintiff shows that the cost of a subscription to the weekly newspaper, The Machinist, published by defendant union, is included in the per capita tax

> collected from each member of the class, and any notice concerning this class action may be given to each member of the class by publication in said newspaper."

The foregoing paragraph shows that the class action was sought to be maintained under subdivision (b) (3) of Rule 23, Subdivision (c) (1) mandates the court as soon as practicable after the commencement of an action brought as a class action, to determine by order whether it is to be so maintained. Subdivision (c) 2 mandates the court to direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The Court of Appeals at 452 F. 2d 797 stated that the former order of the district court permitting the class action amendment contemplated that, in the event of amendment, the district court could determine whether the matter should proceed as a class action at all.

The district court circumvented said mandate in its order of July 27, 1972, by stating:

> "the courts in this district have never thought it necessary to notify all prospective members of the class under Rule 23 (c)."

Very instructive upon the issue of the necessity of notice in class actions are the views of those scholars generally regarded as currently the leading commentators on the Federal Rules:

> "Rule 23(c) (1) provides that 'as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.' There was no corresponding passage in Rule 23 prior to its amendment in 1966.
>
> Either plaintiff or defendant may move for a determination under Rule 23(c) (1). Absent prejudice to the class or the opposing party, mere delay in seeking an affirmative decision under the rule is not a sufficient basis for denying the motion. The court has an independent obligation to decide whether an action brought on a class basis is to be so maintained even if neither of the parties moves for a ruling under subdivision (c) (1). If the court were obliged to wait for a motion before making its determination, the parties would then control the timing for

> deciding the issue. Judge Frankel has suggested that allowing the parties to delay the decision is unsatisfactory because of the obligation to give notice of the institution of the litigation to members of the class in an action under Rule 23(b) (3), and because the court generally should order notice given to class members in actions under Rule 23(b) (1) and Rule 23(b) (2)." (footnotes omitted)
>
> Wright & Miller, Federal Practice & Procedure: Civil § 1785

Petitioner respectfully contends that the Court of Appeals erred in failing to decide whether or not the district court erred in failing to obey said mandates.

NIX DID NOT ABANDON HIS RIGHT TO SEEK FURTHER RELIEF AGAINST INTERNATIONAL AFTER THE ENTRY OF DECLARATORY JUDGMENT.

The Court of Appeals erred in finding from the record before it that "All damage claims for Nix were clearly dropped at pre-trial conference". At pages 16-17 of this petition is the pre-trial order entered January 21, 1972. That order clearly shows that the only damage claim referred to therein was the claim of Nix for damages

against the local union, and that this claim only was abandoned at the pre-trial conference.

The class action amendment was not filed at the time of the pre-trial conference. It was filed on February 8, 1972. The matter of damages and further relief to members of the class could not be considered by the court until after it had entered the declaratory judgment sought by the class action.

Petitioner respectfully contends that the Court of Appeals erred in making such erroneous finding, and in basing its judgment affirming the judgment of the district court thereupon.

It is of great public importance to the administration of justice in the federal courts that this Honorable Court construe the 1966 amendments to Rule 23 of the F.R. Civ. P., and to require uniform application of such rule by all district courts.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit to the end that the judgment of said court in this action may be reviewed

and reversed by this Honorable Court.

Franklin Nix,

Petitioner.

By _____
William G. McRae

Counsel for Petitioner

Address:

608 Lakeshore Drive, N.E.
Atlanta, Georgia 30307
Telephone No. 404-378-2951

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the above and foregoing Petition for Certiorari upon the respondent by mailing a copy of same, with postage first class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for respondent.

This _____ day of August, 1973.

_____
William G. McRae

Counsel for Petitioner

APPENDIX

APPENDIX 1

Franklin NIX
v.
FULTON LODGE NO. 2 OF the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and Davis L. Miller as President of Fulton Lodge No. 2 of the International Association of Machinists and Aerospace Workers.

No. 10462.

United States District Court
N. D. Georgia,
Atlanta Division.

Jan. 9, 1967.

Suit by expelled union member against local union and officer thereof for injunctive relief and damages because of his expulsion from union. The District Court, Sidney O. Smith, Jr., J., held, inter alia, that union member who was an employee on union staff who made accusations against president of international union and the executive council during his campaign to organize union staff members could not be disciplined by expulsion from union for making those statements concerning union matters, and was entitled to an injunction against expulsion and restoration to full membership.

Judgment accordingly.

William G. McRae, Atlanta, Ga., for plaintiff.

J. R. Goldthwaite, Jr., Atlanta, Ga., for defendants.

SIDNEY O. SMITH, Jr., District Judge.

This is a suit brought by plaintiff, Franklin Nix ("Nix") against Fulton Lodge No. 2 of the International Association of Machinists and Aerospace Workers (the "local union"), of which he is a member, under the Labor-Management Reporting and Disclosure Act. 29 U.S.C.A. § 401 et seq. Basically, he seeks injunctive relief against his expulsion for an alleged exercise of his rights of free speech under the act. 29 U.S.C.A. § 411 (a) (2).[1] He likewise seeks damages and further injunctive relief against the dissemination by defendant and others of the facts surrounding his expulsion. 29 U.S.C.A. § 412. Upon the filing by Nix of his original petition, the court issued an ex parte restraining order which was, on subsequent hearing, dissolved as premature as it issued after the filing of charges against petitioner and his hearing before the Trial Committee, but prior to any report to the local union or expulsion. Subsequently, the petition was amended showing actual expulsion. The court issued another ex parte restraining order which was, on subsequent hearing, continued in force until the full hearing on the preliminary injunction by the court. At the full hearing, it was stipulated by the parties that the court's action would be final on the injunctive question and constitute a complete trial on the issues of both temporary and permanent relief, other than the question of damages.

There is little dispute about the facts. The record in the case consists of numerous documentary exhibits adduced on trial, the authenticity of which is agreed upon by both parties.[2] All of such evi-

1. Which reads:
Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

2. Plaintiff's exhibits A, B, C & D concern themselves primarily with the charges and

dence is adopted as the court's findings of fact in this case.

In brief, Nix is a former professional journalist. In 1965 he applied for employment as a press-representative of the International Association of Machinists and Aerospace Workers. The Grand Lodge hired him in this capacity as a "staff employee." The Grand Lodge is made up of members of the union and is governed by a President, eight Vice-Presidents, and a Secretary-Treasurer, who together constitute the executive council of the Union and operate it between conventions of the membership at large. The membership is further organized into Local Lodges and District Lodges, normally by occupational groups, such as railroad workers, airline workers, etc. Each International vice-president is assigned a regional responsibility. Working with him under the executive council are various full-time staff employees and representatives in each region, whose responsibility lies in the financial, organizational, contractual negotiation, publicity, etc. supervision of the local and district lodges within the region. Membership in the union is not required for the employment given to Nix but is normally granted to all staff representatives.

Earlier, beginning in mid-1965, Nix undertook to organize the staff representatives into a union known as the "IAM Representatives Association." This campaign was successful in that the sub-union was organized and certified by the National Labor Relations Board as the authorized bargaining agent for certain employees of the national field staff to bargain with the Grand Lodge with respect to wages, hours, and working conditions of such employees.

In the course of the organizational campaign Nix issued two letters or bulletins to prospective members of the sub-union exhorting their vote against the Grand Lodge in the forthcoming election.[3] In such letters, inter alia, Nix stated:

"Bob Quick, general chairman of United Airlines (then Capital) didn't hesitate to picket Grand Lodge when he thought Hayes ordered him to trample on the rights of his members. You know what happened? They broke their necks getting down to settle things with Bob and get him off that sidewalk. Would Bob do it again? Ask him?" (6/23/66).

The other letter, I'm informed, is addressed to me, but sent to you by Grand Lodge Headquarters on the Grand Lodge postage meter with a date of June 29th and signed by Bob Quick. In it Bob, who was recently helped out by the IP and Plato, reportedly denies that he ever picketed or threatened to picket Grand Lodge, or ever had any differences with Hayes. I would be the first to say that I was not there. But General Vice-President McGlon, who told staff members about it, was not campaigning against a union at the time and had no reason, so far as I know, to deceive people about Bob's Capital differences with Grand Lodge. I kidded him about it some time later in Miami, and he didn't issue any corrections at that time." (7/2/66).

On the basis of such letters, Quick (a District Lodge President in California) filed charges of misconduct against Nix under Article I, Section 7 of the International Constitution. This Section provides for the filing of charges by one member of the International Union, regardless of his local or district affiliation, against another member of the Grand Lodge with the President of the latter's local. Thus the vehicle adopted by the Grand Lodge for trial is the local

trial procedure against Nix by the local union.

Defendant's Exhibits 1 through 14 consist of the by-laws, the trial procedure, correspondence between the principals, copies of NLRB charges pending by Nix against the union, various bulletins published by Nix during his membership in the union, and the deposition of Nix taken by the parties.

3. These are letters signed by Nix dated June 23, 1966, and July 2, 1966, shown as part of Exhibit A.

union and in such capacity the local union acts for the Grand Lodge. (See Exhibit 1 and Exhibit D).

The trial committee was duly formed and a hearing followed in accordance with the international constitution and by-laws. On November 10, 1964, the trial committee reported its verdict of "guilty" and recommended expulsion. In the finding and in the expulsion, the local union concurred by secret written ballot, all as provided by the constitution. Section 14 and Section 15 provide for internal appeals to the International President and to the Executive Council, and to the General Convention. These appeals the plaintiff here disclaims, asserting his right to proceed in district court under 29 U.S.C.A. § 411 at this point. It is agreed that all statements made by Nix, on which his trial and expulsion are based, were made by him in the course of organizing the IAM Representatives Association, or the sub-union.

Just prior to the filing of these charges, Nix was discharged as a paid staff employee by the International President Siemiller. Nix immediately filed unfair labor practice charges against the Grand Lodge arising out of his discharge, charging that the Grand Lodge discriminated in regard to the terms and conditions of employment "in order to discourage membership in a labor organization." Such charges are presently pending before the NLRB.

In essence, the defendant contends that this action is barred:

(a) Because Nix's publications were not an exercise of free speech covered by the Act in that they concerned extra-union matters rather than internal union matters.

(b) Because the complaints herein are preempted by the authority already vested in the National Labor Relations Board.

(c) Because petitioner has not exhausted his internal remedies of appeal as provided by 29 U.S.C.A. § 411(a) (4).

Heretofore, the plaintiff has filed a motion for judgment on the pleadings and the defendant a motion to dismiss, both of which would be satisfied by a ruling on the merits. In addition, the defendant moves to dismiss for failure to join the Grand Lodge as a party. The plaintiff denies the necessity of the joinder, but countermoves to join the International Union as a party defendant. Further, the defendant has filed a motion to strike, directed primarily against plaintiff's claim for punitive damages.

CONCLUSIONS

[1] At the outset, it is clear to the court that the problem here is not concerned with Nix's employment or any claim for damages arising from his discharge. Such matter is properly before the NLRB. Plaintiff's case must rest on his rights as a member of the defendant union in order to invoke the jurisdiction of the court under the so-called Landrum-Griffin Act. See Seeley v. Brotherhood of Painters, Decorators, etc., 308 F.2d 52 (5th Cir. 1962). Legally then, the complaint must stand or fall on petitioner's exercise of some right of free speech under 29 U.S.C.A. § 411(a) (2); a violation of that right by the defendants; and damage to his *membership status* in the union. The eventual discipline complained of was expulsion from membership in the International Union by the trial and vote of the local union. Thus the damage to membership is present.

[2] (a) Of course unions are not prohibited from discharging persons from membership. There are countless reasons, i. e. non-payment of dues, over which the courts rightly have no control. It is only when the expulsion results from an exercise of the "equal rights" or "freedom of speech and assembly" provisions of the "Bill of Rights" as dictated by congressional policy in the Act that the courts should, or ought, to intervene.

Here, the union's primary position is that the utterances here are not within the purview of the act, but are "extra-union" and in the area reserved by Congress to the internal decision of the union itself.

[3] It is apparent to the court that the free speech provisions of the Act are extremely broad. It has been stated that this right of freedom of speech is absolute and is limited only by the two congressional exceptions of reserving to the unions power to enforce reasonable rules (1) as to the responsibility of members toward the organization as an institution and (2) to prevent interference with the union's contractual and legal obligations. 29 U.S.C.A. § 411(a) (2); Salzhandler v. Caputo, 316 F.2d 445 (2nd Cir. 1963), cert. den. 375 U.S. 946, 84 S.Ct. 344, 11 L.Ed.2d 275. It has followed that a liberal interpretation has been given the provisions by the courts and as long as the exercise of speech is related to union activities it has been held sufficient to satisfy this threshold requirement for judicial action. Thus, the truth or falsity of the statement is immaterial, even though it may amount to malicious vilification. Cole v. Hall, 339 F.2d 881 (2nd Cir. 1965). It may even constitute libel or slander. Stark v. Twin City Carpenters District Council, D.C., 219 F.Supp. 528. Nor is it limited to freedom of expression among union members, but protects union members from discipline for public utterances outside the union hall. Graham v. Soloner, 220 F.Supp. 711 (E.D.Pa.1963). Also, it is a right which cannot be contracted away or legislated against within the union. International Bro. of Boilermakers, etc. v. Rafferty, 348 F.2d 307 (9th Cir. 1965).

Here, the union contends that the statements made, since they were directed toward an individual member in the course of organizing another union, did not concern the internal affairs of this defendant union. To so hold would certainly be a strained conclusion. There is no showing here by defendant that the statements fall within either of the two statutory exceptions. On the contrary, the overwhelming evidence is that the statements in question were only a part of a vast activity which is encouraged by Congress. The precise statements must be taken in context. It would destroy the rights granted to permit a union to extract a short statement from the whole, discipline on that statement alone, and later contend that the words therein are the only relevant evidence on the question. Apparently, the defendant seeks to do so here. An examination of Exhibit 11, which contains some twenty mailings put out by Nix in the organizational campaign, from which only seven sentences were made the basis of charges, clearly shows that the specific words were only part of the overall attempt to secure a favorable vote for the sub-union against the Grand Lodge.

[4, 5] "The clear intent of Congress in enacting [the Labor-Management Reporting and Disclosure Act] was to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain." Graham v. Soloner, supra. The basic concern of the statute protecting union member's right to free speech is not in the precise words said, but rather what was being talked about. If the underlying topic of conversation concerns union affairs, then arguments, questions or accusations relating thereto are protected. Nor need they be carefully documented. Stark v. Twin City Carpenters District Council, 219 F.Supp. 528(4, 5) (D.Minn.1963). What more could concern the affairs of the parent union than that its employees were seeking to organize themselves?

It is thus concluded that statements made in the course of an organizational campaign amongst union employees are clearly protected by the Act. Specifically, it is concluded that the statements here, taken in context, are not within any exception provided by law and consequently afford the factual basis necessary for a suit in district court under the Act. 29 U.S.C.A. § 412.

(b) Secondly, the defendant here contends that the relief sought is preempted by the NLRB under the National Labor Relations Act and that the charges pending there now prohibit relief in the court.

[6, 7] It is argued that the NLRB could under proper circumstances restore a person to union membership provided

such membership is a prerequisite to re-employment. Cf. Office Employees Int'l Union, Local No. 11, etc. v. NLRB, 353 U.S. 313, 77 S.Ct. 799, 1 L.Ed.2d 846, reh. den. 354 U.S. 928, 77 S.Ct. 1375, 1 L.Ed.2d 1441 (1957); Roberts v. NLRB, 121 U.S.App.D.C., 297, 350 F.2d 427 (1965). Inasmuch as it is contended here by defendant and concluded by the court that membership is not a prerequisite to a press representative's employment, it is apparent that the relief sought, i. e. reinstatement, would not be afforded by the N. L. R. B. Nor, of course, could the particular damages sought be awarded there. The general argument that the relief sought here is preempted by the N. L. R. B. is best resolved by Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886, at 922, 923 (4th Cir. 1963) wherein it is stated: "The fact that the Act preserves to union members all remedies 'under any State or Federal law or before any court or tribunal' [29 U.S.C.A. § 413] * * only means that the new federal protection was superimposed on protection already available in other forums, 'reinforcing and not supplanting it.' Summers, 'The Law of Union Discipline: What the Courts Do in Fact,' 70 Yale L.J. 175, 176 (1960). This does not mean that the District Court must abstain from exercising its jurisdiction under section 102 [29 U.S.C.A. § 412] when elements of the matter at issue are arguably subject to the Labor Board's jurisdiction. Congress did not intend that before securing the rights it made enforceable in federal courts, individuals should wait for the Labor Board to pass upon such matters as might also be within its competence. (Citations)." See also, Grand Lodge of Int'l Ass'n of Machinists v. King, 355 F.2d 340, 347 (9th Cir. 1964) cert. den. 379 U.S. 920, 85 S.Ct. 274, 13 L.Ed.2d 334; Rekant v. Shochtay-Gasos Union Local No. 446, 320 F.2d 271, 274 (3rd Cir. 1963). Cf. International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958).

[8] (c) Finally, on the main issue is the question of exhaustion of internal remedies. On its face, 29 U.S.C.A. § 411 (a) (4), providing "That any such [union] member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof", appears to be absolute. However, for a variety of reasons—economic, futility, fairness, delay, etc.—the courts have interpreted the provision as permissive and not absolute. Quite early, such provisions were engrafted with a high ratio of exceptions, up to 80%. Summers, supra, 70 Yale L.J. 175 at 207–211 (1960). The problem now is to find instances where strict compliance was required by the courts amid the plethora of decisions admitting an exception for one reason or another.

[9] Since the now landmark case of Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2 Cir. 1961), determination must be made on the state of facts in each particular case. Such a standard imposes considerable difficulty here. The petitioner has confidently waived his rights of internal appeal and stands now on the tenuous proposition that such procedures are unnecessary. A safer course might have been to ask for temporary reinstatement pending internal appeals as was done in the early state case of Sherrioff v. Schimel, 28 L.R.R.M. 2377 (N.Y.Sup.Ct.1951). However, here the petitioner deems any appeal as unnecessary. This is based primarily on a conclusion that Quick, the accuser here, was acting under the supervision and as agent for Siemiller, the international president; that Siemiller was thus in fact the accuser; and that an appeal to him would be futile. A bare claim or allegation of futility is, of course, insufficient to escape the statute. Mendez v. District Council for Ports of Puerto Rico, 208 F.Supp. 917 (D.P.R.1962); Smith v. General Truck Drivers, etc., Union Local, 181 F.Supp. 14 (S.D.Cal. 1960). No evidence is found here to link the actual filing of charges to Siemiller. Such conclusion could only be reached by

the strongest of innuendos from the record before the court and this particular contention is rejected.

[10] However, there is considerable evidence of hostility toward Nix by the international president. A cursory reading of Exhibit 13, containing correspondence between the two culminating in Nix's discharge reveals cross-accusations between the two in which Siemiller stated that Nix's statements were "not well received," that he had "jumped to conclusions, made erroneous statements and substituted fiction for fact." Of even more significance is Exhibit 12, which contains the counter-organizational bulletins published by Siemiller. In one of March 8, 1966, Nix was severely criticised for his tactics and the staff representatives were informed for the purposes "(1) To make you aware of opposition that you will have to meet as you represent our International Union in your organizing campaigns and to give you an opportunity to find an answer to combat this type of a situation, and (2) to show you the type and kind of an individual that Franklin Nix has demonstarted that he is and who is now trying to represent you as the Recording Secretary of an IAM Representatives Association." Another of June 28, 1966, reviews all of Nix's acts in the campaign, which were classified as "harassment and detrimental to the best interests of our overall International Union's progressive march forward," and concludes that "Nix has made many false statements in the material that he has sent you while conducting his organizing campaign." From the entire record, this court concludes that Siemiller has in fact prejudged Nix and agrees now that the statements in question were false. Thus, while the international president Siemiller is not the accuser here, he and the Executive Council do represent the "very officers against whom the complaints are directed" and, thus, the facts here come within the purview of a futile appeal for those reasons and accordingly unnecessary. Calagas v. Calhoon, 309 F. 2d 248 (20) (5th Cir. 1962); Fingar v. Seaboard Air Line Railroad Company, 277 F.2d 698 (5th Cir. 1960); Farowitz v. Associated Musicians of Greater New York, Local 802, 241 F.Supp. 895 (S.D. N.Y.1965). Compare Harris v. International Longshoremen's Asso., Local No. 1291, 321 F.2d 801 (3rd Cir. 1963).

Further, here the plaintiff claims unusual injury by virtue of the possible harm of publicity attendant to appeals being circulated amongst the membership including those he seeks to organize. This too is a factual circumstance which inclines the court to pretermit the requirement of internal appeal in this instance. All in all, in the exercise of discretion, the court holds that, under the facts of this case, the failure of plaintiff to exhaust existing rights of appeal to the International President and the Executive Council, is not a bar to the major relief sought. Farowitz v. Associated Musicans of Greater New York, 330 F.2d 999 (2d Cir. 1964); Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965).

[11] None of this is to say that Nix was right or wrong in what he said, or that Siemiller should or should not have replied. However, as seen, we are not concerned in these matters with truth or falsity. The point is that Nix cannot be disciplined for making the statements. Accordingly, he is entitled to an injunction against expulsion, restoring him to full membership.

[12, 13] There remain the problems raised by the various special motions. As seen, the expulsion was handled under the International Constitution and By-laws, which made the local union the agency for processing the charges. Under such circumstances, there is no hesitancy in concluding that the International Union is bound by these same procedures and the reinstatement ordered here is effective for Nix's membership in the Grand Lodge as well as the local lodge. This follows because Fulton Lodge No. 2 is merely the agency designated by the International. The expulsion is the act of the union as a whole and not some individual or some branch with-

in it. Such an association has no legal existence as an entity separate from its members and may be considered in the nature of a class action. See Calagas v. Calhoon, 309 F.2d 248 (5th Cir. 1962). Accordingly, the Grand Lodge is considered bound in this action whether a formal party or not, and the motion to dismiss is denied. By and through the international constitution and by-laws, it is in effect in active concert and participation with the local.

[14-16] Similarly, the act of Miller individually in processing the charges is but the act of the union as a whole and he has no personal liability in this capacity. Everything done by him was completely within the scope of his duties as local president and the complaint is directed—not at the administrative carrying out of the by-laws—but at the result. He is bound by the court's order the same as any other officer, but no more so. It is only when a union official acts outside his authority that personal liability may arise. Accordingly, the motion to dismiss as to the defendant Miller in an individual capacity is granted. While there are a few exceptions, the weight of authority appears to be against the granting of any punitive damages in a suit under this act. See McCraw v. United Assn. of Journeymen & App. of Plumbing, etc., 341 F.2d 705 (6th Cir. 1965); International Brotherhood of Boilermakers, etc. v. Rafferty, 348 F.2d 307 (9th Cir. 1965); Magelssen v. Local Union No. 518, Operative Plasterers', etc., 240 F.Supp. 259 (W.D.Mo.1965). And, the motion to strike the claim for punitive damages is also granted. A reading of the damage cases indicates that recovery is extremely limited. In this particular case, since Nix's salary claims are before the N. L. R. B. and unaffected by membership status, his claim for damages is even more limited. The determination of the damage claim is reserved for a future date.

It is concluded that the extent of the court's injunctive power is to prevent expulsion and to restrain the written publication of the Trial Committee's report, recommendation, or the action of the membership vote.

Relief is, therefore granted to the extent provided by the attached order and judgment.

It is so ordered.

ORDER

The within and foregoing matter coming on before the court, now, after hearing evidence and argument of counsel and the parties having consented to a final trial on the question of equitable relief, and upon the filing by the court of written findings of fact and conclusions of law under Rule 52, F.R.Civ.P.,

It is considered, ordered, and adjudged

(1) That the court has jurisdiction of this case by virtue of 29 U.S.C.A. § 412.

(2) That defendant's expulsion from its membership was a violation of plaintiff's right of free speech and free expression of opinions under 29 U.S.C.A. § 411(a) (2);

(3) That plaintiff was within the right to sue protected by 29 U.S.C.A. § 411(a) (4).

(4) That plaintiff, having been unlawfully expelled from the union and denied the right of free speech guaranteed to him by the statute is entitled to injunctive relief.

Accordingly, the defendant union and the International Association of Machinists and Aerospace Workers are hereby ordered to reinstate Franklin Nix to membership forthwith and to expunge from its minutes and records and dismiss all charges against him, all proceedings of the Trial Committee or its recommendations, and all votes taken thereon. Defendant is further enjoined from the written publication or release of any of such records to any other member or officer of the International Association of Machinists and Aerospace Workers, or to any private party.

The defendant, its officers, agents, servants and members, are further enjoined, both temporarily and permanently, from interfering directly or indirectly with the plaintiff in his right to speak,

publish, or disseminate his views on union matters.

The restraining order previously issued by the court is superseded and the bond therefor required under Rule 65(c), F.R.Civ.P. is hereby exonerated.

It is so ordered.

APPENDIX 2
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24571

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Appellants,

versus

FRANKLIN NIX,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(July 28, 1969)

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: This is an internal union free speech case governed by the Labor-Management Reporting and Disclosure Act of 1959.[1] The district

[1]Jurisdiction in the district court is based upon LMRDA § 102, 29 U.S.C. § 412. Free speech within the union is guaranteed by the "Bill of Rights" provisions of LMRDA (Title I) under § 101(a) (2), 29 U.S.C. § 411(a) (2):

"*Freedom of speech and assembly.* — Every member of any labor organization shall have the right to

court found that Appellee Nix was expelled from membership for the exercise of protected speech and ordered Fulton Lodge No. 2 and its international body, to reinstate Nix to full membership in the union and to refrain from further interference with his free speech rights. *Nix v. Fulton Lodge No. 2, IAM*, N.D. Ga. 1967, 262 F. Supp. 1000.

We affirm in part and vacate in part.

The underlying facts are straightforward and undisputed. Nix was employed by the Grand Lodge of IAM as a press representative for the international union. He became a member of IAM, although membership was not a condition of employment, and affiliated with Fulton Lodge No. 2. His position with IAM was categorized as "staff employee." The staff employees were the only unit of IAM not organized and represented by an independent bargaining agent. Nix initiated an organizational campaign to form the IAM Representatives Association, an independent bargaining representative for the staff employees. The campaign extended for a year or more, with heat and

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meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertainng to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

passion not diminished by the fact that the employer was itself a union. Nix and IAM President Siemiller circulated mailings to the staff employees and to each other. Without attempting to catalog all the vigorous remarks and charges made and the industrial warfare that took place, they included charges by Siemiller that Nix was making threats against him and the Executive Council of the union and was subjecting the union to constant harassment and propaganda in the press and elsewhere. Siemiller charged that "Nix had made many false statements in the material that he has sent you while conducting his organizing campaign." Nix made a written charge that per diem was being paid by the union to employees in violation of the constitution, and demanded of Siemiller that he proceed to recover from Siemiller himself, other officers and members of the Executive Council, and the sureties on their bonds, union funds said to have been improperly paid out. Nix brought a §8(a) (5) charge against IAM, then withdrew it. He made a series of charges of fraud and misconduct against a member of the Executive Council, and an investigating committee considered the charges and rejected them. Siemiller wrote Nix, implying that he might be discharged, stating that he and his "Associates on the Executive Council" were not justified in continuing Nix's employment if in their judgment he was not needed. Nix carried on a running argument with Siemiller about vacation, automobile mileage, exclusion of Nix from meetings, isolation of Nix from other employees, and a variety of other matters.

A representation case was brought before the National Labor Relations Board. The Board certified the Representatives Association as the appropriate bargaining unit and ordered an election.

After the Board order but before the election Nix wrote and disseminated to staff employees a letter stating *inter alia* that "Bob Quick, general chairman of United Airlines (then Capital) didn't hesitate to picket Grand Lodge when he thought Hayes [former IAM President] ordered him to trample on the rights of his members. You know what happened? They broke their necks getting down to settle things with Bob and get him off that sidewalk. Would Bob do it again? Ask him?" A second letter, responding to Quick's denial that he ever picketed the International, admitted that the information was derived from hearsay sources, but noted that, on confrontation by Nix, Quick did not deny the incident. These letters were only two of more than twenty mailings that Nix sent out in his organizational efforts.

The election was held and the Representatives Association won. Approximately a month later Siemiller notified Nix that he was fired. A few days later, September 6, 1966, Nix filed unfair practice charges against the union. The next day Bob Quick, a member of and president of an IAM local in California, invoked provisions of the IAM constitution (1966),[2] and charged

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[2]All references to the union constitution are to that of 1966.

This particular provision is Art. L, § 7, which governs the procedure for preferring charges against a member for a violation other than of his duties as an officer or representative of the Local Lodge or District Lodge.

Nix with misconduct in making the statements concerning Quick in the two letters described above. The alleged misconduct is that described by Art. L, § 3, which subjects a member to possible reprimand, fine, suspension and/or expulsion from membership after notice and hearing for, *inter alia*:

> Circulating or causing in any manner to be circulated any false or malicious statement reflecting upon the private or public conduct, or falsely or maliciously attacking the character, impugning the motives, or questioning the integrity of any member or officer.[3]

The charges brought by Quick alleged misconduct in terms tracking the above language almost verbatim except for the insertion of the dates of the two Nix letters.

A hearing was conducted before a trial committee[4] which knew of the pendency of the charges made by Nix to the NLRB. The committee found that Nix "did circulate or cause to be circulated a false and/or malicious statement reflecting upon [Quick's] private

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[3]Provisions such as this, limiting criticism of union members and officers, are not unique to IAM. See the remarks of Senator Goldwater (R-Ariz.) on the Senate Floor that, as of 1959, the constitutions of "74 unions limit member criticism of officers and fellow members and 15 unions prohibt the issuance of any literature emanating from members unless the consent of the national officers is received." 2 Legis. Hist. of the LMRDA 1235 (NLRB ed. 1959) (hereinafter "2 LMRDA . . .").

[4]Art. L, § 8 of the IAM constitution requires that a five man hearing committee be appointed by the local union president to conduct the disciplinary proceedings, file a report to the membership, and make recommendations of punishment.

or public conduct, which statement falsely and/or maliciously attacked his character and integrity as a Union member." The committee recommended that Nix be expelled from membership. By overwhelming votes the Fulton Lodge membership sustained both the report and the recommended expulsion.

The trial committee noted in its report to the Fulton Lodge membership that it excluded from evidence in the misconduct proceedings "statements and/or documents [which Nix tried to have admitted] pertaining to his discharge from the Staff and his organizing campaign, which in our opinion as a Trial Committee, had nothing to do with this case." *See* Part III, *infra*.

After the trial committee hearing and before the local membership vote, Nix filed his complaint in district court without attempting to exhaust his appellate remedies under the IAM constitution.[5]

In the district court Fulton Lodge filed a three-pronged motion to dismiss: (1) district court jurisdiction was preempted by the unfair practice charge pending before the Board; (2) Nix waived his right to judicial review by his failure to exhaust his internal appellate remedies; (3) and Nix's statements, made in the context of an organizational campaign, were "extra-union" and consequently unprotected by the free speech provisions of the LMRDA. The motion was denied. On

[5]The intra-IAM appellate review procedure calls for a member disciplined by a local lodge to petition successively the IAM President, the Executive Council, and finally the Grand Lodge Convention. Each petition must be made within 30 days of the decision in the previous disposition. Art. L, §§ 14-16.

appeal Fulton Lodge raises the identical issues on specification of error, to which is added a fourth: (4) the district court erred in making its order applicable to the IAM Grand Lodge, i.e., to the international union as a whole.

The unfair practice proceedings were still pending when the district court entered its judgment below. Subsequently, but before submission of this appeal, the Board decision was rendered, finding that the discharges of Nix and others were not discriminatorily motivated but that after the Representatives Association was certified as bargaining agent IAM, by refusing to furnish it with requested information, breached its duty to bargain. *IAM and Nix, et al.* 172 NLRB 239.

I. Preemption

Congress expressly provided two broad anti-preemption provisions in the LMRDA[6] in response to objections initially raised by then Sen. John F. Kennedy (D-Mass.).[7] This court has held that rights guar-

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[6]LMRDA §§ 103 and 603, 29 U.S.C. §§ 413 and 523. The former is expressly applicable to Title I; the latter is a "catch-all" for the entire Act. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L.J. 175, 176 (1960); *see also* Summers, *Preemption and the Labor Reform Act — Dual Rights and Remedies*, 22 Ohio St. L.J. 119, 123-128 (1961).

[7]2 LMRDA 1108-1112, 1221, 1233-1235. The House substitute for S. 1555 retained the Bill of Rights provisions from the Senate bill, including Section 103. 2 LMRDA 1520. On the day the Landrum-Griffin Bill was signed into law Senator Goldwater remarked on the Senate floor:

> Section 103 preserves any other rights and remedies which a union member may have under any other State or Federal law, before any other court or agency,

anteed under the LMRDA are not subject to preemption by the National Labor Relations Board. *International Bhd. of Boilermakers, etc. v. Braswell*, 5 Cir. 1968, 388 F.2d 193, 195-196.[8]

II. Exhaustion of remedies

We have no difficulty in concluding that the district court did not err in holding that the facts of Nix's case were such as not to require him to exhaust intra-union remedies under § 101(4) of LMRDA, 29 U.S.C. § 411 (a) (4).[9] *Detroy v. American Guild of Variety Artists*, 2 Cir. 1961, 286 F.2d 75, 79. The subsection does not

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or under any union constitution or bylaws. It thus guards against the application of the preemption problem in connection with the newly granted bill of rights, and preserves any broader safeguards for union members which may be contained in some union constitutions or bylaws.

[8] In *Braswell* the plaintiff sought damages only not reinstatement. Nix seeks both damages and reinstatement. As discussed below, the district court reserved the question of damages.

[9] "*Protection of the right to sue.* — No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency; irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding; or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."

establish a jurisdictional bar or absolute waiver to judicial review, but preserves the discretionary exhaustion doctrine which allowed pre-LMRDA courts to determine whether pursuit of internal remedies should be required in a given case. *Simmons v. Avisco, Local 713, Textile Workers*, 9 Cir. 1965, 350 F.2d 1012; *Detroy, supra; cf. NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 1968, 391 U.S. 418. The first review authority to whom Nix would have been required to apply was IAM President Siemiller, and the next review authority was the Executive Council. The continuing difficulties between Nix on the one hand and Siemiller and the Executive Council on the other fully justified the district court's conclusion that Nix was not required to attempt to exhaust his intra-union appellate remedies before seeking judicial relief. *See Calagaz v. Calhoon*, 5 Cir. 1962, 309 F.2d 248, 259-260. *Cf. Glover v. St. Louis-San Francisco Ry. Co.*, 1969, ____ U.S. ____, 37 U.S.L.W. 4084, 4086 (U.S. Jan. 14, 1969) (No. 38) (under Railway Labor Act). The union is the victim of its own appellate review structure.[10]

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[10]*But compare* Note, *Public Review Boards: A Check on Union Disciplinary Power*, 11 Stan. L. Rev. 497 (1959) (examines impartial review boards established in 1954 and 1957 by the Upholsterers and the United Auto Workers Unions). IAM's self-regulation argument, *see* Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 615 (1959), would be more efficacious if the union's constitution or by-laws provided for impartial review. *See* Lipset, *The Law and Trade Union Democracy*, 47 Va. L. Rev. 1, 47-49 (1961). One critic has noted: "appeals to international presidents and councils, though generally permitted, cannot be expected to cure political infections in trials below, as international officers are no more immune to factional politics than those of locals." Note, *Free Speech, Fair Trials, and Factionalism in Union Discipline*, 73 Yale L.J. 472, 483-484 (1964).

III. The offensive statements: protected or not?

Fulton Lodge presses the theory that statements made in the context of an intra-union organizational campaign are "extra-union" comments and not protected. The fallacy in this argument lies in the facts. Nix was expelled from membership, according to the trial committee report, solely for the effect of the remarks upon Quick's personal character and union reputation, not on the basis of any organizational activity. As we have noted above, the committee excluded from evidence statements and documents proffered by Nix pertaining to the organizing campaign and to his discharge, on the ground they had nothing to do with the case.

The union-employee and union-officer cases relied on by the union miss the mark.[11] This is a "union-member" case. *See* 262 F. Supp. at 1004.

The Bill of Rights (Title I) of the LMRDA did not enjoy an orderly genesis.[12] Consequently the statutory

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[11] *See, e.g.*, Strauss v. International Bhd. of Teamsters, E.D. Pa. 1959, 179 F. Supp. 297, 300. *Accord:* Thompson v. New York Cent. R.R. Co., 2 Cir. 1966, 361 F.2d 137, 145; Airline Stewards & Stewardesses Assn. v. Transport Workers Union, 7 Cir. 1964, 334 F.2d 805, 808; Hill v. ARO Corp., N.D. Ohio 1967, 275 F. Supp. 482, 489. The gist of the above cases is that the LMRDA protects membership rights only, not rights to continued employment or office.

[12] For comprehensive analyses of the legislative travial surrounding the formulation of the Bill of Rights, *see* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960); Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819 (1960); Hickey, *The Bill of Rights of Union Members*, 48 Geo. L.J. 226

language and the legislative history are a source of confusion as well as enlightenment.[12] The courts, therefore, have substantially shaped the Bill of Rights into a guarantee of union democracy, with the right of free speech enjoying a particularly favored position. The landmark decision interpreting LMRDA § 101 (a) (2) is *Saltzhandler v. Caputo*, 2 Cir. 1963, 316 F.2d 445, in which the Second Circuit held that a union may not subject to retributive disciplinary action a member accused of libeling or slandering a union officer. The

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(1959; Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L. Rev. 199; Sherman, *The Individual Member and the Union: The Bill of Rights Title in the LMRDA of 1959*, 54 N.W. L. Rev. 803 (1960); Smith, *The LMRDA of 1959*, 46 Va. L. Rev. 195 (1960). The provisions of Title I were born amidst Stormy debate on the Senate floor. *See* 2 LMRDA 1102-1119, 1220-1239 (debates and votes on the McClellan and Kuchel amendments).

[12]Since the Bill of Rights was an amendment introduced from the floor, it never received "the careful technical review and clarification which comes from scrutiny by a congressional committee and its legislative staff." Cox, *supra* note 12 at 831-833. One commentator has complained that "resort to [LMRDA] legislative history will at best be difficult, and may serve more to obscure than to illuminate intent." Smth, *supra* note 12, at 198. Yet another has observed:

> "Turning to the statute for assistance is similarly frustrating. Since Title I was presented from the floor, it contains purposeful ambiguities and technical compromises thought necessary to insure passage. Moreover, it [the Kuchel substitute amendment] was hastily drawn to modify what had become an inevitable individual rights section of the act."

Atleson, *A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 Minn. L. Rev. 403, 409 Archibald Cox, labor law professor and former Solicitor General, suggests that "courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." Cox, *supra* note 12, at 852.

Saltzhandler rationale has been subsequently extended by the courts to protect from disciplinary retribution numerous types of communication.[14]

From this judicial evolution of the scope of the LMRDA free speech protection, a general rule is perceivable: a union member has the statutory right "to express any views, arguments, or opinions" inside or outside of a union meeting,[15] subject to only three general limitations: (1) reasonable union rules relating

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[14] *See e.g.*, Giordani v. Upholsterers International, 2 Cir. 1968, 403 F.2d 85 (accusations of union fund misappropriation); International Bhd. of Boilermakers v. Rafferty, 9 Cir. 1965, 348 F.2d 307 (circulation outside the union of handbills proposing by-law revisions); Cole v. Hall, 3 Cir. 1965, 339 F.2d 881 (malicious vilification of union officers); Farowitz v. Associated Musicians, 2 Cir. 1964, 330 F.2d 999 (exhortation to fellow members not to pay dues believed to be illegally excessive); Kelsey v. Philadelphia Local 8, Stage Employees, E.D. Pa. 1968, 294 F. Supp. 1368 (job assignment complaints); Archibald v. Local 57, Operating Engineers D.R.I. 1967, 276 F. Supp. 326 (publication and distribution of material libelous of union officers and business agent); Deacon v. Operating Engineers, Local 12, C.D. Calif. 1967, 273 F. Supp. 169 (authorship of newspaper article stating personal opinions and containing accusations against union officers); Leonard v. M.I.T. Employees Union, D. Mass. 1964, 225 F. Supp. 937 (circulation of defamatory material); Graham v. Soloner, E.D. Pa. 1963, 220 F. Supp. 711 (picketing; Gartner Soloner, E.D. Pa. 1963, 220 F. Supp. 115 (picketing); Stark v. Twin City Carpenters District Council, D. Minn. 1963, 219 F. Supp. 528 (slander of union business agent during meeting.) *See also*, Note, *Bill of Rights of Members of Labor Organizations, 1959-1964*, 40 Notre Dame Law. 86, 94-95 (1964).

[15] As a result of Senator McClellan's insertion of a semicolon after the word "opinions" in the Kuchel text, the guarantee was expressly extended beyond mere union hall comments to cover any statement concerning union affairs, including those made in public. *See* 2 LMRDA 1230; *see also* 2 LMRDA 1236, 1270, 1280. *See generally* Atleson, *supra* note 13, at 431, 441; Sherman, *supra* note 12, 818.

to the conduct of union meetings; (2) reasonable rules relating to individual responsibility to the union as an institution; and (3) reasonable rules requiring members to refrain from conduct which would interfere with the union's performance of its legal or contractual obligations. The first limitation is immaterial to the case at bar. The "reasonableness" standard of the latter two limitations is a legacy of legislative compromise which leaves the balancing of the institutional interests and individual rights to the trial judge.[18] The district court correctly held that the union did not show Nix's statements to fall within the ambit of either of these provisos. He cannot be disciplined for the substance and effect of his comments about Quick. *See Saltzhandler v. Caputo, supra,* at 450 n.8. As the Second Circuit held in *Saltzhandler:*

> "The LMRDA of 1959 was designed to protect the rights of union members to discuss freely and criticize the management of their

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[18] *See* Aaron, *supra* note 12, at 865-866:

> "Almost all unions claim the right to discipline individual members or groups of members who openly challenge the authority of their leaders, especially when such conduct carries overtones of rival unionism or alliances with employers. No one can reasonably object to giving a legitimate organization the right to protect its institutional interests; yet it is undeniable that unions, like other voluntary associations, in time succumb to the iron law of oligarchy.' Democracy cannot thrive in an environment hostile to dissent and opposition; therefore a line must somehow be drawn between legitimate resistance and illegal subversion."

See also Cox, *supra,* note 12, at 834-835; "Dissent in a union, like treason in a nation, must be suppressed if the purpose is to destroy the union, encourage a rival, or bring about the violation of legal or contractual obligations."

unions and the conduct of their officers. The legislative history and the extensive hearings which preceded the enactment of the statute abundantly evidence the intention of Congress to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain."

316 F.2d at 448-449. The statements of Nix here involved were protected speech.[17]

IV. Scope of relief

The injunctive relief granted by the district court purported to bind the international organization as well as the local lodge. The international body was not named in the Nix complaint as a party, was not served with process, did not appear as a party, and no express relief was sought against it.[18] Nix moved for leave to

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[17]The protection provided by LMRDA § 101(a) (2), 29 U.S.C. §411 (a) (2), is not absolute. A union or its officers simply may not use their disciplinary powers and processes to suppress statements made by a member so long as such comments do not fall within the ambit of the general limitations of the statute designed to provide institutional security. A union member or official who considers himself defamed by the statements of another member, is not preempted by the LMRDA from recourse to a civil action for defamation. *See* Saltzhandler v. Caputo, *supra*, at 451. *Cf.* Linn v. Plant Guard Workers, 1966, 383 U.S. 53 (under Labor-Management Relations Act); Pettway v. American Cast Iron Pipe Co., 5 Cir. 1969, 415 F.2d 1376 [No. 25826, May ——, 1969], slip opinion at p. 18, n.22.

[18]The complaint sought a declaration that the statements concerning Quick did not "afford a basis for disciplinary action against plaintiff *by Fulton Lodge No. 2*" and that "the prosecution of plaintiff on such charges *by such lodge*" violated the rights secured to him by 29 U.S.C. § 411(a) (2).

join the international as a party, but rather than specifically ruling on the motion the district court treated the action as one against the union as a whole and not against individuals or a branch of the union, considering that the union had no legal existence as an entity separate from its members and that the international was in active concert with the subordinate local by and through the constitution and by-laws. The court concluded that the action was in the nature of a class action. Also it held Fulton Lodge No. 2 was merely an agent of the international.[19]

Unquestionably Fulton Lodge is a creature of the international organization, created and controlled by the IAM constitution and by-laws.[20] The charges filed with the local organization were dictated by both substantive and procedural directives contained in the IAM constitution. *See* notes 2 through 5, *supra*, with accompanying text. Prosecution of charges against an IAM member cannot, under the circumstances, be considered the independent action of an autonomous local organization. Furthermore, membership, though initiated by and through the local organization according

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[19]We are required to note lack of jurisdiction apparent on the face of the record, so we are not concerned with whether the local, named as a party, can raise on appeal the validity of extending the injunction to include the entire union, not named as a party.

[20]Art. I, § 3, Art. VI, § 5, and Art. D, §§ 1-12, describe the governmental organizational structure of the IAM, its supervisory power over subordinate bodies, and the regulations controlling government of the local lodges. The provisions leave no doubt that the ultimate power within the institution is not in the local lodges.

to the constitution,[21] is in the *international* union.[22] And the international organization, to a large extent, is responsible for the actions of its subordinate bodies. *See generally* Evans, *The Law of Agency and the National Union*, 49 Ky. L.J. 295 (1961). *Cf.* 1 CCH Lab. Law Rep. ¶ 1695.70 (pointing out that the NLRA §2 (13), 29 U.S.C. § 152 (13), perpetuates the common law rules of agency to govern international-subordinate responsibility). In addition, it would be difficult to effectuate the purposes of the LMRDA free speech provision in a case such as is before us, where membership is in the international, if the international cannot be subjected to a remedial order.

But the existence of the substantive elements of a cause of action did not vest the district court with jurisdiction over the international. LMRDA § 102, 29 U.S.C. § 412 permits the district court to grant "such relief (including injunctions) as may be appropriate," but this does not expand in personam jurisdiction beyond that arising from proper designation of a party as defendant and proper service of process upon the party. See Fed. R. Civ. P. 19 (a) and 4 (d) (3). *Calazaz v. Calhoun*, 309 F.2d 248 (5th Cir. 1962) is not to the contrary. That case was brought as a class action against all members of a union and against individuals who were representatives of the class. The plaintiff denied any intent of making the union itself a party defendant. Service of process was had on an officer of the union who gave actual notice to the membership

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[21] Art. I, §§ 1 and 2 (eligibility criteria and procedure governing local lodge investigation and election to membership).

[22] Art. I, § 13 (affiliation with a local or district lodge is transferable throughout the IAM).

who comprised the class. Nix did not name or seek process or relief against the international union to the extent it can be sued as though a jural entity, nor did he bring a class action against members of the international association with process on a member of the class. Nix sued the local lodge and its president. This is not enough to bind the international.

However, Nix was entitled to amend to seek relief against the international. On remand he should be given that right if he still desires it.

V. Damages

The district court reserved for future determination the question of compensatory damages to Nix.[23]

We REVERSE in part, VACATE in part and REMAND for further proceedings not inconsistent with this opinion.

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[23] The court struck Nix's claim for punitive damages. This was correct. International Brotherhood of Boilermakers v. Braswell, 5 Cir. 1968, 388 F.2d 193.

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION NO. 13818

STATUS OF CASES

(Filed: Aug. 13, 1970)

In Civil Action 10463, plaintiff brought an internal union free speech case pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (hereafter

LMRDA), 29 U.S.C.A. §401 *et seq.* seeking injunctive and other relief from his expulsion from union membership. At a full hearing on the question of a preliminary injunction, it was stipulated by the parties that the Court's action would be 'final' on the injunctive features and constitute a complete trial on all issues other than the question of damages. After considering a number of preliminary matters, the Court held that Nix was unlawfully disciplined for making statements protected by LMRDA. An injunction issued, which the Court held also bound the parent international union, the Grand Lodge of the International Association of Machinists and Aerospace Workers. Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000 (N.D. Ga. 1967).

The Local Lodge and Grand Lodge appealed to the Fifth Circuit which affirmed the decision below in all respects except the application of the injunction to the Grand Lodge. The Court of Appeals held that although the substantive elements of a cause of action against the Grand Lodge existed under LMRDA, the District Court had never acquired jurisdiction over the international by virtue of proper designation of the international as a defendant and service of process, and it therefore could not make its injunction applicable to the Grand Lodge as well as the Local Lodge. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 220 (5th Cir. 1969). But the Court of Appeals also held that upon remand, "Nix was entitled to amend and seek relief against the international." *Ibid.*

Accordingly, the plaintiff filed an amendment to his complaint adding the Grand Lodge as a defendant, and requesting appropriate service of process. But instead of asking the Court to remedy his expulsion from union

membership. Nix amended to allege wrongful discharge from his *employment* as Press Representative of the Grand Lodge, and prayed only for reinstatement to his employment and "all other appropriate relief."

The defendants have filed motions to dismiss. The Local Lodge contests the employment aspects of the amendment arguing that no relief for wrongful termination of employment could be granted against it, since it is not party to the employment relationship between Nix and the Grand Lodge. Both the local and the international argue that the Court has no subject-matter jurisdiction over the claim for relief from wrongful discharge, and that the allegations pertaining to wrongful discharge fail to state a claim upon which relief can be granted under LMRDA, or alternatively state a claim which is barred by principles of *res judicata*. While the Grand Lodge did contend that it had not been properly served with process, that contention was subsequently withdrawn when service was admittedly perfected on April 3, 1970.

On April 16, 1970, plaintiff filed a notice of dismissal of his amended complaint against the Grand Lodge. Less than two months later he filed C.A. No. 13818, in the face of which the defendants challenge the notice of dismissal in C.A. 10463 on various technical grounds.

In contrast to C.A. 10463, C.A. 13818 is addressed essentially to plaintiff's former employment with the Grand Lodge. Nix alleges that the Grand Lodge wrongfully, maliciously and wantonly disciplined him by firing him, and having its agent Fulton Lodge No. 2 expel him from membership. Although he does ask the Court to confiscate the record of the union proceedings directed toward expulsion, and to enjoin interference with his

exercise of the right to speak, publish or disseminate his views on union matters—relief directed toward his union membership status—Nix also prays restoration to his employment as press representative, and compensatory and punitive damages.

In Count II of the complaint in C.A. 13818, Nix brings a class action seeking declaratory and injunctive relief against the international's enforcing Article L, Section 3 of the IAM Constitution, on the grounds that the provisions of that section which authorize discipline of any member who circulates or causes to be circulated certain false and malicious statements against union members or officers, are inconsistent with the free speech provisions of LMRDA, *i.e.* 29 U.S.C.A. §411(a)(2).

The defendant international has moved to dismiss C.A. 13818, because of the pending C.A. 10463, on principles of *res judicata*, collateral estoppel, splitting causes of action, election of remedies, for failure to state a claim upon which relief can be granted, and lack of jurisdiction. The Grand Lodge has also moved to strike certain paragraphs of the complaint.

TERMINATION OF EMPLOYMENT

In C.A. 10463, this Court ruled that plaintiff could not invoke jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529, in order to vindicate his right, if any, to employment as press representative by the Grand Lodge. See, Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000, 1004 (N.D. Ga. 1967). This ruling was not disturbed on appeal. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 (5th Cir. 1969). The defendants' motions in C.A. 10463

and 13818 raise questions as to the effect of this ruling under principles of the law of the case and *res judicata*.

Before remand by the Court of Appeals, plaintiff had never sought relief for termination of his employment in C.A. 10463. The Grand Lodge was not a party to this action then. The issue as to the international's status in this litigation was raised for the first time by the local, which at the hearing on December 16, 1966, moved to dismiss for failure to join an indispensable party. The plaintiff, local and the Court agreed that the sole reason for adding the international would be to make certain that any injunction requiring reinstatement to union membership would be effective against all parties which controlled that status. Hearing, Dec. 16, 1966, T-49-50. Plaintiff never did effectively join the Grand Lodge, until remand by the Court of Appeals. Therefore, the issue of relief against the international for terminating plaintiff's employment was not actually raised, and could not have been raised before the amendment now challenged.

Thus, that earlier ruling stands as *dicta* only, and will not be given *res judicata* or collateral estoppel effects on the issue of relief for plaintiff's firing. At most, it is simply the laws of the case enunciated by this Court. This conclusion is reached in spite of the Fifth Circuit's ruling in Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 at n.11 (5th Cir. 1969). All that was held there was that the union-employee and union-officer cases proffered by the local were not relevant to the issue whether the offensive statements were protected by LMRDA, because at that point there was no issue in the case regarding Nix's firing.

The ruling that in a case brought pursuant to Sections 102 and 609 of LMRDA, plaintiff may not vindicate his right, if any, to employment as press representative by the Grand Lodge was based on the premise that these sections may be invoked to protect rights enunciated in Section 101 of LMRDA, 29 U.S.C.A. §411, only when such rights have been violated by acts affecting union membership status. *Accord,* Sewell v. The Grand Lodge of IAM, C.A. No. 3055-N (N.D. Ala., filed July 9, 1970). On reconsideration, the Court feels that the statute should not be construed that narrowly. *Cf.* International Brhd. of Boilermakers v. Braswell, 388 F.2d 193, 200-201 (5th Cir. 1968). Rather, when a plaintiff asserts his union has invoked sanctions in violation of specific rights secured under Section 101, the courts have jurisdiction of his claim even if the particular sanctions applied affect plaintiff's status as an appointed or elected union officer, official or employee, rather than his status as a member. Such sanctions are within the scope of the phrase "or otherwise discipline" as used in Section 609 of LMRDA, 29 U.S.C.A. §529. *See* Grand Lodge of IAM v. King, 335 F.2d 340, 344-345 (9th Cir. 1964), *aff'g.* 215 F. Supp. 351, 354 (N.D. Cal. 1963), *cert. den.* 379 U.S. 920 (1964); Cefalo v. International Union of Dist. 50 Mine Wkrs., 311 F. Supp. 946, 953 (D.D.C. 1970); Retail Clerks Union, Local 648 v. Retail Clerks Intl. Assn., 299 F. Supp. 1012, 1020-1021 (D.D.C. 1969); DeCampli v. Greeley, 293 F. Supp. 746, 751-753 (D.N.J. 1968); Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968); Hill v. ARO Corp., 275 F. Supp. 482, 489 (N.D. Ohio 1967); George v. Bricklayers, M. & P. Int'l. Union of America, 235 F. Supp. 239, 242 (E.D. Wis. 1966); *contra,* Thompson v. New York Central R.Co., 361 F.2d 137, 145 (2d Cir. 1966);

Air Line Stewards and Stewardesses Assn. v. Transport Wkrs. Union, 334 F.2d 805, 808 (7th Cir. 1964); Strauss v. International Bhd. of Teamsters, C.W. and H. of America, 179 F. Supp. 297, 300 (E.D. Pa. 1959). Careful distinction between the rights protected by Section 101 (*e.g.* freedom of speech) and the sanctions invoked in violation of those rights (*e.g.*, expulsion from union membership or termination of employment) reveals that it is not sufficient to simply state that the LMRDA protects only 'membership rights' in the union. For while it is agreed that the LMRDA provides no remedy for union action arguably violating a member's Section 101 rights, but affecting only his employment with some third party, Seeley v. Brotherhood of Painters, etc., 308 F.2d 52, 60 (5th Cir. 1962), the situation is different where a union violates its member's protected rights by action adversely affecting his status as an appointed or elected officer, official or employee of that union. The union may not use the coincidence of that status to restrict that member's Section 101 rights.

Accordingly, in the abstract, the Court has jurisdiction over plaintiff's amendment in C.A. 10463 praying for relief against the Grand Lodge for firing him, and that amendment does state a claim upon which relief can be granted—at least in the sense that plaintiff conceivably could prove a set of facts entitling him to recovery. The same conclusions follow for the claim stated as part of the separate civil action, C.A. 13818. These conclusions are reached in spite of the facts that the Court's prior ruling arguably set the law of the case. It is well recognized that the law of the case does not inexorably bind the court which enunciated it, and at least one commentator recommends that a court reverse itself

when convinced that its previous enunciation was erroneous. 1B Moore's Federal Practice ¶0.404[1] 405-409 (2d Ed. 1969).

EFFECT OF NLRB DECISION AND JUDICIAL REVIEW THEREOF

Although it has been determined that the Court has jurisdiction over plaintiff's present claim against the Grand Lodge, and that the relevant allegations do state a claim upon which relief can be granted—at least in the sense that conceivably plaintiff could prove a set of facts entitling him to recovery—it appears that the controlling issue of fact in that claim has been determined adversely to the plaintiff in a prior proceeding, and that under the principles of collateral estoppel, that determination precludes recovery here.

When the plaintiff was fired, he filed unfair labor practice charges with the NLRB, alleging a discriminatory discharge in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C.A. §§158(a)(1) and 158(a)(3). However, the Board found as a matter of fact that Nix had been discharged for pilfering documents from his superior at IAM. Nix v. N.L.R.B., 418 F.2d 1001, 1005 (5th Cir. 1969). On petition for review of the Board's decision, the Court of Appeals affirmed that finding of fact by ruling that there was substantial evidence to support the Board's finding that Nix was discharged "for cause." Nix v. N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969).

In either C.A. 10463 or C.A. 13818, under the principles of collateral estoppel, the Board's finding of fact—made after an adversary hearing and upheld on judicial review—controls the issue of the reasons Nix was fired.

Purvis v. Great Falls B. & C. Trades Council, 266 F. Supp. 661, 662-663 (D. Mont. 1967); *see also* Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 344 F.2d 300, 306 (9th Cir. 1965).

The court is aware that some cases might support a contrary conclusion. However, they were ruling in a different context. In Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local Union No. 584, 359 F.2d 598 (2d Cir. 1966), the Court of Appeals ruled that a decision of the NLRB that a union had violated Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C.A. §158(b)(4) would not be binding on a court confronted with that issue in a civil action brought pursuant to Section 303 of the LMRDA, 29 U.S.C.A. §187. *Id.* at 602, n. 7. *See also* Taube Electrical Contractors v. International Bhd. of Elec. Wkrs, Local Union No. 349, 261 F. Supp. 664 (S.D. Fla. 1966). And in Thompson v. Moore, 223 F.2d 91 (5th Cir. 1955), *aff'g* 131 F. Supp. 658 (S.D. Tex. 1953), the Court of Appeals held that where the Railroad Retirement Board found a former railroad employee still "permanently disabled for work," and the employee proceeded directly to court rather than first exhausting his administrative remedy, the findings of the Board were not conclusive (the term *res judicata* was used by the lower court) in the employee's suit for damages against the railroad which refused to rehire him. 223 F.2d at 93. However, the Court does not deem these cases controlling here.

Accordingly, Nix's claim for relief against the Grand Lodge for firing him fails, whether asserted by amendment in C.A. 10463 or in a separate action, Count I of C.A. 13818. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted—

treated here as a motion for summary judgment—is granted, without prejudice in C.A. 10463 to plaintiff's right to amend as outlined below.

COUNT II OF C. A. 13818

Plaintiff seeks declaratory and injunctive relief against the Grand Lodge, specifically asking the court to strike down Article L, Section 3 of the IAM Constitution on the grounds that it is inconsistent with the free speech provisions of LMRDA, Section 101(a)(2), 29 U.S.C.A. §411(a)(2). He seeks such relief in the form of a class action, alleging that he represents all the members of IAM in the United States.

The scope of the class Nix claims to represent is on its face overly broad. Only the claims of union members against whom Article L, Section 3 is being invoked present a sufficiently justiciable controversy for judicial resolution. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969); United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). Accordingly, the scope of the class is deemed restricted to such persons.

This claim should have been made by amendment to the complaint in C.A. 10463. It is essentially an allegation that when Local Lodge No. 2 expelled Nix from membership, the international was acting as agent for the Grand Lodge. The claim is therefore very much bound up with plaintiff's claims against the local. Accordingly, C.A. 13818 is dismissed without prejudice to plaintiff's right to amend in C.A. 10463 in order to assert the

claim made in Count II of C.A. 13818, as limited by the immediately preceding part of this opinion.

IT IS SO ORDERED.

This is the 12th day of August, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION No. 13818

ORDER THAT ORDER OF AUGUST 13, 1970, DEALING WITH COUNT II STANDS AS ENTERED

(Filed: Nov. 16, 1970)

On August 13, 1970, an order was entered in these two actions. All parties apparently are unhappy with it

and have filed motions to clarify some aspects and reconsider others.

I.

In Civil Action Number 10463, no ruling was made on the defendant Grand Lodge's objection to plaintiff's notice of dismissal. In order to enter further ruling, some chronology is necessary:

February 20, 1970—after remand from the Court of Appeals, plaintiff filed an amended complaint, naming the Grand Lodge as a defendant,

March 10, 1970—amended complaint served on Roy M. Bond, Jr.;

March 30, 1970—motions to dismiss filed by the Grand Lodge (one ground challenged service on Bond), and by Fulton Lodge No. 2;

April 3, 1970—amended complaint served on H. C. Summers;

April 15, 1970—motions to dismiss renewed by both defendants;

April 16, 1970—plaintiff filed a notice of dismissal of the amended complaint against the Grand Lodge.

The Grand Lodge objects that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Fed. R. Civ. P. 41(a)(1), should be considered motions for summary judgment precluding plaintiff from dismissal by stipulation. That defendant's motions were based on three grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted because, a plaintiff may not invoke federal

jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529 in order to vindicate his right (if any) to employment as press representative by the Grand Lodge; (3) res judicata. Accompanying the Grand Lodge's motions were an affidavit relating to service of process and copies of Fulton Lodge No. 2 v. Nix, 415 F.2d 212 (5th Cir. 1969) (the prior appeal in this case), of Nix v. N.L.R.B., 418 F.2d 1001 (5th Cir. 1969), the Court of Appeals' review of Nix's unfair labor practice charge against the union. The affidavit relates solely to the issue of the validity of the March 10, 1970, service of process. The copies of cases are relevant only to the defense of res judicata.

The Grand Lodge cites Harvey Aluminum Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953). In that case the Court held that even though no answer or motion for summary judgment had been filed, the plaintiff could not voluntarily dismiss by stipulation where issue on the merits had been joined in an extended (3 day) hearing on plaintiff's motion for a preliminary injunction. The Grand Lodge also relies on Butler v. Denton, 150 F.2d 687 (10th Cir. 1945), where the Court of Appeals held that plaintiff had no absolute right of dismissal before the filing of an answer or motion for summary judgment but after the United States filed a petition for intervention which tendered justiciable issues (on the merits). 150 F.2d at 690. And the Grand Lodge finally cites Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961), to the effect that the plaintiff loses his right to dismiss by stipulation once the defendant has filed a motion to dismiss for failure to state a claim upon which relief can be

granted, even if the motion is unaccompanied by affidavits or other extraneous matter.

The Court respectfully rejects the views expressed in *Tele-Views, supra.* Fed. R. Civ. P. 41(a)(1) does not admit of the interpretation that that Court made. The rule simply does not cover the situation in which a defendant has filed a motion to dismiss supported by extraneous matter: under such circumstances, whether to allow dismissal must be resolved by the exercise of sound judicial discretion. Kilpatrick v. Texas & P. Ry. Co., 72 F. Supp. 632, 633 (S.D.N.Y. 1947). For purposes of Fed. R. Civ. P. 41(a)(1) a motion to dismiss accompanied by affidavits or other extraneous matter should not preclude voluntary dismissal by stipulation unless the motion to dismiss raises justiciable issues regarding the merits of the claim, or comes at such an advanced stage of the proceedings that it is manifestly unfair to allow plaintiff an automatic uncontested dismissal. The other cases relied on by the Grand Lodge appear to involve such circumstances, and therefore are not persuasive here, where the proceedings against the Grand Lodge—especially those regarding plaintiff's firing—had not reached an advanced stage, and where the motion to dismiss supported by extraneous matter raised only questions as the jurisdiction and *res judicata. See* Toulmin v. Industrial Metal Protectives, 135 F. Supp. 925, 927-928 (D. Del. 1955).

The Grand Lodge also argues that plaintiff's right, if any, to drop his claim against it is governed by Fed. R. Civ. P. 21, which allows a party to be dropped only by court order. This contention is without merit. Under Fed. R. Civ. P. 41(a)(1), the word "action" means all claims against any one defendant, and a dismissal by

notice can be effective against less than all defendants. Terry v. Pearlman, 42 F.R.D. 335, 337 (D. Mass. 1967).

Accordingly, the Grand Lodge's objections to plaintiff's notice of dismissal in Civil Action Number 10463 are overruled.

II.

Count I of the complaint in Civil Action Number 13818 was a claim against the Grand Lodge under LMRDA to the effect that termination of plaintiff's employment as a Grand Lodge press representative violated rights secured by Section 101 of LMRDA, 29 U.S.C.A. §411. The Court ruled that although it does have subject matter jurisdiction over such a claim, and although allegations to that effect do state a claim upon which relief theoretically could be granted, nevertheless a controlling issue of fact in that claim had been adjudicated adversely to the plaintiff in a prior proceeding, and that principles of collateral estoppel required judgment for the defendant on Count I of Civil Action Number 13818. Nix v. The Grand Lodge of the International Ass'n. of Machinists, C.A. No. 13818 (N.D. Ga., filed August 13, 1970).

The Grand Lodge requests reconsideration of the decision that there is subject matter jurisdiction and that Count I states a claim upon which relief theoretically can be granted. But this request includes no legal authority, and raises no points not already considered. Accordingly, this aspect of the prior decision stands.

Plaintiff requests reconsideration of the decision that by virtue of collateral estoppel, the determination of the NLRB that he was fired for pilfering documents from a superior, specifically upheld upon review in Nix v.

N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969), is controlling in Civil Action No. 13818. Upon further research, that view of collateral estoppel appears correct, and the decision stands as made. *See* Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969); Hyatt Chalet Motels, Inc. v. Salem Bldg. & Constr. Trades Council, 298 F. Supp. 699, 701-703 (D. Ore. 1968). Plaintiff also asserts that the defense of *res judicata* cannot be raised by motion to dismiss. This contention is without merit. *See* Thomas v. Consolidation Coal Co., 380 F.2d 69, 75 (4th Cir. 1967); Larter & Sons v. Dinkler Hotels Co., 199 F.2d 854, 855 (5th Cir. 1952). There is likewise no merit to plaintiff's contention that he has not had an adequate opportunity to be heard on this issue. Local Rule 8(d) provides that usually, all motions are decided on brief without a hearing. The Court is not aware that oral hearings on motions to dismiss or for summary judgment are mandatory under Constitutional principals or the Federal Rules of Civil Procedure. Local Rule 8(b) requires that any response to a written motion be submitted within 10 days thereof. However, this rule is not rigidly enforced, and in fact the Court would probably have considered any brief submitted between the time the motion was originally filed (March 30, 1970)[1] and the date of decision (August 13, 1970).

Finally, plaintiff objects to the restriction placed on his Count II class claim by the order of August 13, 1970. Simultaneously, the defendant argues that the Court should not have allowed the plaintiff to maintain a class

[1]The district court erred. The instant action, Civil Action No. 13818, was not filed until June 3, 1970, and the defendant's motion to dismiss was not filed until June 26, 1970.

action at all, because plaintiff has not and cannot show facts justifying a class proceeding, and because the claim sought to be made as a class action in Civil Action No. 13818 could have been brought originally in Civil Action No. 10463.

Evers v. Dwyer, 358 U. S. 202 (1958), relied on by plaintiff, does not require that the Court allow plaintiff to bring this action on behalf of every member of IAM in the United States. That decision dealt only with the question whether the individual plaintiff had presented a justiciable claim, and did not reach the question of the scope of the class. Therefore, plaintiff's objection to the restriction is not well taken.

Contrary to the defendant's contention, a complaint in a class action need not state sufficient facts to support the conclusion that a class action can be maintained. Such a requirement would constitute a return to fact pleading, contrary to the intent of the Federal Rules of Civil Procedure. *See* 5 Wright and Miller, Federal Practice and Procedure §1202 (1969). Neither is there substance to the contention that the provisions of Section 101(a)(2) of LMRDA, 29 U.S.C.A. §411(a)(2) preclude a class attack on the IAM's anti-sedition section leaving only the question whether, in the case of each individual, application is unreasonable. Such a section may be overly broad, unnecessarily vague, or otherwise unreasonable on its face.

The Court agrees with the Grand Lodge that the class claim originally brought as Count II of Civil Action No. 13818 should be brought as part of Civil Action No. 10463 rather than as a separate action. The original Civil Action No. 10463 was a claim against Fulton Lodge

No. 2 that plaintiff's rights under LMRDA were violated by his expulsion from membership. That expulsion was based on the premise that certain of plaintiff's conduct violated Article L, Section 3, lines 21-25 of IAM's Constitution. Count II of Civil Action No. 13818 was simply a claim that those same rights (and the rights of persons similarly situated) are violated by the existence and threatened application of that provision of the Union constitution.

Clearly, principles of *res judicata* require that two such interlocked claims be brought in the same lawsuit. *Cf.* Rhodes v. Jones, 351 F.2d 884, 889 (8th Cir. 1965). Therefore, plaintiff may not maintain a separate action on the class claim. However, this case is not in a posture which either requires or persuades the Court to deny plaintiff leave to amend to add the class claim. The issue of damages in Civil Action No. 10463 is still pending. The class claim should not require another hearing, and hopefully the only facts not now of record will relate to the scope of the class.

Accordingly, that part of the Order of August 13, 1970, dealing with Count II of Civil Action No. 13818 (pp. 9 and 10) stands as entered.

IT IS SO ORDERED.

This the 13th day of November, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

Opinion filed June 27, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, Plaintiff	)	
vs.	)	CIVIL ACTION
FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS; and DAVIS L. MILLER as PRESIDENT of FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Defendants	)	NUMBER 10463

In order to understand the status of this case, it is necessary to refer to the court's decision and opinions under dates of August 12, 1970, and November 13, 1970, entered in this and companion case No. 13,818. That decision was affirmed by the Fifth Circuit, leaving before the court only those claims specifically designated therein. They were:

1) Plaintiff Nix's claim for general damages[1] against the local union, and

[1]Any claim for damages for loss of employment was barred by the previous orders.

2) The class action against the Grand Lodge for declaratory and injunctive relief attacking the validity of article L, section 3 of the Internation Constitution.

Upon remand at a pre-trial conference with counsel, the plaintiff abandoned his theoretical claim for general damages and limited his class action to the invalidity of article L, section 3 on its face. Inasmuch as the latter is purely a question of law, plaintiff was directed to set up his claim by amendment in No. 10,463 and briefs were scheduled. (See order of January 21, 1972.)

This course was followed and the amendment duly filed on February 8, 1972. However, in addition to the class claims for interlocutory and injunctive relief, the plaintiff prayed for expenses and attorneys fees. Additionally, allegations of fact which are disputed by defendant were inserted in the amendment asserting malice, bad faith, etc., against the International. These facts have not been adjudicated by any court and are unnecessary to a determination of the legal questions presented. Accordingly, defendant's motion to strike paragraphs 7, 8, 9, 10, 11, 15 under Rule 12(f) is granted. The remaining allegations are deemed appropriate for consideration by the court in connection with the class claims. It should be noted, however, that the class has been previously limited to those "union members against whom article L, section 3 is being invoked." (Order of Aug. 12, 1970, p. 10).

As finally constituted the case presents two questions:

1) Whether article L, section 3 of the I A M Constitution which authorizes the union to discipline a member for "[c]irculating or causing in any manner any false statement reflecting upon the private or public conduct, or falsely or maliciously attacking the character, impugning the motives, or questing the integrity of any member or officer" is invalid, i.e., without force or effect, because it is, on its face, inconsistent with the provisions of section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2).

2) Whether attorney fees may be awarded in an action, such as this one, brought pursuant to section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412.

I

ARTICLE L, SECTION 3 OF THE I A M CONSTITUTION IS ON ITS FACE INCONSISTENT WITH SECTION 101(a)(2) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 AND IS, THEREFORE, VOID, WITHOUT FORCE OR EFFECT.

Section 101(a)(2) of the LMRDA, which was enacted to protect individual union members who questioned or criticized practices or policies of the union or its leaders from retalitory punishment, provides:

> "FREEDOM OF SPEECH AND ASSEMBLY - Every member of any labor organization shall have the right to meet and assemble freely with other members; to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to conduct of meetings: PROVIDED, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Moreover, Congress assured that the individual union member could not contract away the right of free speech and assembly granted to him under section 101(a)(2) by enacting section 101(b) of the Act (29 U.S.C. § 411(b) which provides:

> "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section [section 101] shall be of no force or effect."

To provide for the enforcement of the policies stated in the LMRDA, Congress created a judicial remedy which the individual union member may seek in the federal courts.

> "Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be fought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located." LMRDA § 102, 29 U.S.C. § 412.

Literally, article L, section 3 of the I A M Constitution authorizes the union to punish an individual member for circulating a false or malicious statement, the entire substance and effect of which is directed toward a union officer or another member. It is, at best, a rule against defamation; and, in this court's judgment, a union rule which makes criticism - whether true, false, or even malicious - punishable is plainly inconsistent with the individual union member's statutory right under section 101(a)(2) of the LMRDA "to express any views, arguments or opinions" inside or outside the union meeting.[2] While libelous or slanderous

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[2]This is not a novel position. Invoking the LMRDA, courts have repeatedly held that an individual member may not be punished by his union for comments - even if malicious, libelous or slanderous - about other union members. See, e.g., Fulton Lodge No. 2, I A M v. Nix, 415 F. 2d 212, 217-218 (5th Cir. 1969); Giordani v. Upholsterers Int'l Union,

(Continued on next page)

statements are not protected by the federal constitution, the LMRDA does protect such activities in the sense that a union may not punish a man for expressing his opinion or views about a union officer or other member even if his statements are false or malicious.[3] Congress wished to stimulate democracy in union management and as Judge Lumbard wrote in the landmark case, Salzhandler v. Caputo, 316 F. 2d 445 (2d Cir. 1963), "The democratic and free expression of opinion in any group necessarily develops disagreements and divergent opinions. Freedom of expression would be stifled if those in power could claim any charges against them were libelous and then proceed to discipline those responsible on a finding that the findings were false." 316 F. 2d at 451.

Defendants argue that article L, section 3 is within the scope of the three recognized limitations to a union member's statutory right of free speech - (1) reasonable union rules relating to the conduct of union meetings;

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2 (Continued)
403 F. 2d 85, 89 (2d Cir. 1968); International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 311 (9th Cir. 1965); Cole v. Hall, 339 F.2d 88; (2d Cir. 1965)(malicious comments); Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963).

[3]A union officer or other member who is libeled or slandered retains the right to bring an ordinary civil action for damages in the appropriate forum. Fulton Lodge No. 2, I A M v. Nix, 415 F.2d 212, 219 n. 17 (5th Cir. 1969).

(2) reasonable rules relating to individual responsibility to the union as an institution, and (3) reasonable rules requiring members to refrain from conduct which would interfere with the union's performance of its legal or contractual obligations. It is not.

A blanket rule against false or malicious statements about one's fellow union members is too broad a limit on speech to be a "reasonable union rule" for any of the three limitations' purposes. Defendants have attempted to show some hypothetical circumstances in which article L, section 3 could have been used properly, i.e., the curtailment of speech was perhaps proper in light of one of the exceptions to free speech recognized in the LMRDA. The problem is, however, that by its terms it applies not only to situations in which perhaps some properly narrow union rule might be validly applied, but to many circumstances in which it might be invalidly applied. There is little doubt in the court's mind that no uncircumscribed union rule limiting speech can be applied consistently with the LMRDA, e.g., where the speech involved questions the honesty of a union official who after a thorough investigation is shown to be honest but nevertheless at the time of the speech the speaker acted in good faith and with reasonable grounds to believe it was true. Specifically, in respect to the "reasonable rules relating to individual responsibility to the union as an institution" exemption, this court does not believe a challenge to a union official's integrity to be an act of disloyalty to the union. Just the opposite, it is the duty of the individual union member to speak out about apparent and possible improprieties that might come to his attention. In some instances, a member's loyalty to his union will require

him to report what appear to be improprieties even though he knows that he may well be proved wrong after his charges are investigated; and, in fact, the union member may hope he will be proved wrong.

Accordingly, the petition is granted in this respect and the court declares such section to be invalid and permanently enjoins the defendants and any officers, agents, or servants of the defendant unions against the imposition of disciplinary sanctions under said section or any other use of said section whatsoever.

II

ATTORNEY FEES ARE ALLOWABLE IN ACTIONS BROUGHT UNDER SECTION 102 OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

There is a split in authority on the question of whether a successful plaintiff may be awarded reasonable attorney fees in action brought pursuant to LMRDA § 102, 29 U.S.C. § 412. Compare Gartner v. Soloner, 384 F. 2d 348 (3d Cir. 1967) (attorney fees allowed), cert. denied, 390 U. S. 1040 (1968) with McCraw v. United Ass'n of Journeymen Plumbers, 341 F. 2d 705, 710 (6th Cir.), aff'g 216 F. Supp. 655, 664 (E.D. Tenn. 1965) (attorney fees not allowed).[4]

[4]Other cases which have considered the questions are Robins v. Schonfeld, 326 F. Supp. 525, 531 (S.D.N.Y. 1971) (attorney fees allowed); Cefalo v. Int'l Union Dist. 50 U M W, 311 F.Supp. 946, 955 (D.D.C. 1970)(attorney fees allowed); Sands v. Abelli, 290 F.Supp.

(continued on next page)

The controversy centers on whether Congress' grant of authority to the federal courts to allow in actions brought under section 102 "such relief (including injunctions) as may be appropriate" includes the authority to award attorney fees to a successful plaintiff.

The purpose of the LMRDA, especially section 101, was to advance the cause of union democracy and to protect the individual union member from the tyrannical practices of some union officials. To effectuate the Act's purposes, Congress chose to rely on suits in federal courts by individual union members seeking to enforce the various rights created by LMRDA. In section 102, Congress expressly granted the courts very broad power to fashion a remedy in such suits.

Since Congress speaks through its legislation, the most important guide to legislative intent is the language of the statute under consideration. It requires no straining to read the phrase "such relief (including injunctions) as may be appropriate" to

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4 (continued)
677 (S.D.N.Y. 1968) (attorney fees allowed); Magelssen v. Local Union No. 518, Operative Plasterers', 240 F.Supp. 259, 263 (W.D.Mo. 1965) (attorney fees not allowed); Jacques v. Local 1418, Longshoreman's Union, 246 F.Supp. 857 (E.D.La. 1965) (attorney fees not allowed); Leonard v. M I T Employees Union, 225 F.Supp. 937, 940 (D.Mass. 1964) (attorney fees not allowed); Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964) (attorney fees not allowed); Vars v. International Bhd of Boilermakers, 215 F. Supp.943 (D.Conn. 1963) (attorney fees not allowed), aff'd 320 F. 2d 576 (2d Cir.1963) (without mention of lower court's disposition of the matter of attorney fees).

include the grant of discretionary power to allow attorney fees to plaintiffs who are able to secure their rights under the LMRDA only after long and expensive court battles. Furthermore, courts should construe a statute in a manner which will realistically advance the purposes for which it was enacted. Suits by individual union members are necessary to effectuate the congressional policy of insuring union democracy. Certainly, awards of attorney fees to successful plaintiffs in appropriate cases will tend to encourage union members to institute suits needed to secure their rights under the LMRDA.

Those courts which have disallowed attorney fees under LMRDA § 102 have relied heavily on two factors that this court considers to be less significant than the broad sweep of section 102's language and the importance of effectuating the LMRDA's general purpose. The factors relied on are (1) some other sections of the LMRDA specifically provide for the recovery of attorney fees while section 102 does not expressly mention fees and (2) some comment in the legislative history that attorney fees are not allowable.

It is true that sections 201(c) and 501 (b) of the LMRDA (29 U.S.C. §§ 431, 501) explicitly mention recovery of attorney fees. Applying reasoning skin to <u>expressio unius est exclusio alterius</u>, some courts have concluded that, since section 102 does not actually mention attorney fees, attorney fees are not allowable. Sections 201(c) and 501(b) are enforcement provisions for parts of the LMRDA which provide for relatively narrow, specialized types of actions by union members. These sections do not relate directly to section 102 which is broader in scope. However, sections 201 and 501 do show that Congress

believed an award of attorney fees is an appropriate remedy in some case where an individual member sues his union under the LMRDA. They do not in any way conclusively establish that Congress intended for the phrase "relief . . . as may be appropriate" never to encompass an award of attorney fees.

The legislative history relied on by some courts consists of a statement by Senator Goldwater off the Senate floor and a dissenting report filed by nine members of the House Committee on Education and Labor.[5]

Senator Goldwater was a member of the Senate's Labor Committee, but he was not the author or sponsor of the floor amendment which eventually became LMRDA § 102. Accordingly, his brief statement before the House Committee on Education and Labor that attorney fees were not recoverable under the Senate bill was only the view of an individual member of Congress as to the meaning of particular language of a specific enactment and, thus, is not a safe guide to legislative intent. See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921). The dissenting House Report is similar. Actually the report represents the view of nine members of the House of Representatives on the meaning of

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[5]For the remarks of Sen. Goldwater see U.S. Dept.of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 307 (1964). For the dissenting report see 1959 U.S.Code Cong. § Ad. News 2491, 2492. For a discussion of the limited value of legislative history as a guide to construction of sections 101 and 102 of the LMRDA, see Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212, 217 n. 13 (5th Cir. 1969).

legislation recently passed by the Senate. Since the Senate bill contained what became section 102 the report may have some relevance, but it is not controlling. Neither of these bits of the long and twisting legislative history should be considered absolutely definitive of the scope of appropriate relief under LMRDA.[6] They are isolated statements of the views of individual members of Congress. The legislative history that is really most important in construing section 102 is found in those often-repeated, plain statements made throughout the Act's course through Congress that the purpose of the LMRDA is to insure union democracy and to protect the rights of the individual union member. Allowing attorney fees will effectuate that purpose and will also be entirely consistent with section 102's language that the courts are to grant "relief (including injunctions) as may be appropriate."

Accordingly, the court rules that reasonable attorneys fees, always in the discretion of the trial court, may be assessed in such actions.[7] As applied to this case, plaintiff

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[6]The fact that section 102 originally provided for the Secretary of Labor to enforce union member's rights and then was changed to allow the members themselves to bring suit shows that appropriate relief does not include attorney fees. But see Gartner v. Soloner, 384 F.2d 348 (3d Cir.1968)(dissenting opinion). To the contrary, it helps denote the remedy as one requiring a "private Attorney General",a class of actions ordinarily calling for the grant of discretionary attorneys' fees. See, e.g., Lee v. Southern Home Sites Corp., 444 F. 2d 143 (5th Cir. 1971).

[7]At some point, petitioner prays for "expenses"

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cannot collect attorneys' fees for all of his litigation against the defendants, much of which was unsuccessful. To the contrary, he may only seek an award for that portion connected with the section 102 enforcement actions for reinstatement and attacking the validity of the union rule dismissed in Part 1. Accordingly, an application setting out the claims therefor may be submitted to the court within 15 days and the defendants shall respond thereto within 10 days; following which the court will consider the claim and render such award as discretion deems appropriate.

IT IS SO ORDERED.

This the 26th day of June, 1972.

s/Sidney O. Smith Jr
Sidney O. Smith, Jr.
United States District Judge

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7 (continued)
and attorneys fees. In the court's view only such expenses as may ordinarily be recovered as court costs are allowable and upon presentation in a proper cost bill, approved by the court, will be granted.

APPENDIX D

Opinion filed July 27, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX	)	
	)	
vs.	)	CIVIL ACTION
	)	
FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND DAVIS L. MILLER AS PRESIDENT OF FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	)	NUMBER 10463

By an order of June 26, 1972, the court granted plaintiff's claims for declaratory and injunctive relief against the enforcement of Article L, Section 3 of the IAM Constitution and ruled that plaintiff was entitled to attorneys fees, subject to later determination by the court, upon a claim to be submitted in 15 days.

Instead, plaintiff has moved to amend the June 26th order (1) by limiting the declaratory judgment to only a portion of the offending Article, (2) by reinstituting his claim for damages previously waived, (3) by reconsidering the rulings on defendant's motion to strike, and (4) by notifying the members of the class of the litigation at this late date. Except as regards number (3), the relief requested is denied.

(1) The court thought it implicit in the previous order that only those portions of Article L, Section 3, set out on pages 2 and 3 were covered by the declaratory judgment and injunction granted on page 8. If not, such order is amended to so provide.

(2) The present request to litigate the question of damages is particularly vexing to the court. Throughout this long and complicated litigation, now almost six years old, plaintiff's position has vacillated from time to time. Accordingly, upon the remand of the case against the local union, the court called a conference in January, 1972, to agree on the future course of the litigation and to final disposition. At the conference, the matter of damages was raised by the court and discussed at length with counsel. It was explained that only a technical claim for general damages was left and they were expressly waived by plaintiff's counsel. Concurrently, he stated he intended to pursue plaintiff's claim for special damages by certiorari to the Supreme Court from the Fifth Circuit opinion. The reason for the court's inquiry, of course, was to set a trial for any damage issue and it was so stated. As the same was not necessary, the court proceeded to set a briefing schedule on the constitutional question. All of these proceedings were placed in an order by the court on January 12, 1972. Subsequently, plaintiff's counsel asked to amend the order and himself prepared the order of January 21, 1972, for the court. Under either, it is clear that there is no claim for damages left in this case. Moreover, no claim was made therefor in plaintiff's amendment filed on February 8, 1972.

By its opinion on the appeal of this case

(415 F.2d 212), the Fifth Circuit ruled that the Grand Lodge had not properly been served so as to become a party defendant to this action. Consequently, another problem for the court if there were to be a claim for damages against it was to effect a proper service. However, the Grand Lodge agreed to become a party for the constitutional question under the order of January 21, 1972, thereby obviating the question for the issues left in the case.

From the above, it is certain to the court and clear from the record that no claim for damages is in the case. The pre-trial order of January 21, 1972, controls the future conduct of the litigation and the court so rules. Rule 16.

(3) For the reasons stated in the order of June 26, 1972, the motion for reconsideration of the rulings on the motion to strike are denied.

(4) The plaintiff's position on the class action is not clearly understood by the court. All that is sought is declaratory and injunctive relief, which has been granted. The court's order to such effect is as binding on the defendant as it would be if a thousand plaintiffs had brought suit. Under such circumstances, the courts in this district have never thought it necessary to go through the time and expense to notify all prospective members of the class under Rule 23(c). No request to do so has been made by plaintiff and no mention of it was made by counsel at the January conference. To the contrary, it was agreed that the facial unconstitutionality of the Article would be litigated as directed with the plaintiff representing a class "of union members against whom the provision is

being invoked." Plaintiff has furnished the court no list of such persons nor undertaken any discovery for such purposes. Under all these circumstances, the court sees no purpose in the notification and rules that the motion for notification is not timely. The declaratory judgment stands for the benefit of anyone who might be affected thereby in the future.

Believing that all litigation must come to an end at some time, plaintiff is nonetheless granted another 15 days to perfect the claim for attorneys' fees under the June 26th order and the defendant 10 days in which to reply. Failing such procedure, the claim for attorneys' fees will be deemed waived.

Defendant's motion for reconsideration is stayed pending ruling by the court on the question of attorneys' fees.

IT IS SO ORDERED.

This the 26th day of July, 1972.

s/Sidney O. Smith Jr
Sidney O. Smith, Jr.
United States District Judge

APPENDIX E

Opinion filed Aug. 28, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX	)	
	)	
vs.	)	CIVIL ACTION
	)	
FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; and DAVIS L. MILLER AS PRESIDENT OF FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	)	NUMBER 10463

In this case by the court's orders of June 25, 1972, and July 26, 1972, (on motion for reconsideration), the plaintiff was granted the right to recover attorneys' fees as determined by the court on a showing by the parties. Such showing has now been filed with the court and the determination of such fees is ripe for decision.

Concurrently with his response, plaintiff's counsel has again moved to alter and amend the June 26th order. For the reasons stated in the order of July 26, 1972, this motion is again denied. Additionally, the court would add that, upon remand, the only possible claim for damages belonged to Franklin Nix in his private capacity. No claim for class damages was pending and none was made. In the pleadings and other orders framing the issues, as yet there is no claim for

damages as presently sought in the case other than as contended by the latest motions and briefs. As stated, if there had been any claim for damages insisted upon at the January pre-trial conference, it would have long since been scheduled for trial. The court has inherent power to control litigation before it and, under the facts as they occurred, the previous orders and directions of the court must govern the subsequent conduct of the case. It is so ruled, and the motion to amend is again denied.

As to attorneys' fees, counsel's claim consists of a request for an assessment of $2.50 per member of the defendant union, or a total fee of 2-1/2 million dollars, and a series of arguments over the social desireability of such a course by the court. Specifically, the court directed a filing of the claims relating to the class action feature of the case, as opposed to the private litigation on behalf of plaintiff Nix for which damages were not recoverable. Instead of filing a statement of time spent, the nature of the services rendered, etc. as anticipated, the multimillion dollar gross claim was made.

In this circuit, the amount of attorneys fees to be awarded is generally in the discretion of the court. Electronics Capital Corporation v. William Donald Sheperd, 439 F.2d 692 (5th Cir. 1971). See also Gray v. First National Bank in Dallas, 393 F.2d 371 (5th Cir. 1968); Gresham v. Calmar S. S. Corporation, 414 F.2d 799 (5th Cir. 1969); Hoffman v. Aetna Life Ins. Co., 411 F.2d 594 (5th Cir. 1969).

"What is a reasonable attorney's fee is a question for the determination of the district court, which must determine it on the

merits of each case, taking into consideration the nature of the litigation, the amount involved in the controversy, the result of the suit, the length of time spent on the case, the care and diligence exhibited, and the character and standing of the attorney, viewed in the light of the knowledge and experience of the court as a lawyer and judge." Berkshire Mutual Insurance Company v. Moffett, 378 F.2d 1007 at 1013 (5th Cir. 1967). In the absence of specifics as to time, the court can only exercise its discretion on the basis of the other factors, with particular emphasis on the court's knowledge of the case and experience. See Bagby Land & Cattle Co. v. California Livestock Comm'n. Co., 439 F.2d 315 (5th Cir. 1971).

In this case, the issue upon which counsel obtained relief arose long after the original trial of the private plaintiff's case. There has been no trial time and, so far as the court knows, no time spent in discovery procedures on this issue. The question was presented by amendment to the pleadings and on brief plus the celebrated short conference with the court. Attorneys' fees in such cases are deemed by the court to be compensatory and not punitive in nature.

The court has reviewed the file insofar as it relates to the issue presently litigated on which the award is based. Applying the appropriate factors thereto and, in the exercise of discretion, the court finds that the sum of $3,000.00 represents reasonable attorneys' fees. In the event counsel is required to defend an appeal of the court's rulings in the Fifth Circuit, he will be entitled to an additional fee for services performed solely in that connection and may apply for an additional fee if successful at

such time.

Accordingly, judgment may issue for plaintiff and against the defendants for the sum of $3,000.00 attorneys fees and costs of suit.[1]

IT IS SO ORDERED.

This the 25th day of August, 1972.

s/Sidney O. Smith Jr
Sidney O. Smith, Jr.
United States District Judge

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[1]Movant also seeks recovery of Marshal's and Clerk's costs totaling $48.84. Such costs are recoverable and may issue upon a cost bill submitted in accordance with the rules.

APPENDIX F

Opinion filed Sept. 26, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX	)	
	)	CIVIL ACTION
vs.	)	
	)	
FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al	)	NUMBER 10463

This is the third motion by plaintiff to alter or amend the final judgment of the court in his favor in this case. For the reasons stated in the previous orders of June 26, 1972, July 26, 1972, and August 25, 1972, the motion is denied on the merits of the case.

On the motion insofar as it relates to the award of attorneys' fees, the basis for the award is set out in the court's order filed August 28, 1972. Counsel correctly points out that the judgment issued by the Clerk was entered against all the original defendants. It should have entered against THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS alone. Accordingly, the judgment dated August 28, 1972, is vacated against all other defendants. In all other respects, the motion is denied.

IT IS SO ORDERED.

This the 26th day of September, 1972.

s/Sidney O. Smith Jr.
Sidney O. Smith, Jr.
United States District Judge

EXHIBIT G

Opinion filed Oct. 2, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX	)	
	)	CIVIL ACTION
vs.	)	
	)	
FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al	)	NUMBER 10463

In this protracted litigation,[1] now six years old, the court on June 26, 1972, granted plaintiff injunctive relief against the enforcement by defendant union of a by-law held to be violative of the Labor-Management Reporting and Disclosure Act of 1959. Concurrently, the court ruled for plaintiff that, in the discretion of the court, attorneys fees could be awarded for the successful bringing of such an action under §102 of the Act.

In the order, the court granted plaintiff's counsel 15 days in which to furnish the court in affidavit form his claim for fees. Counsel failed to make the showing as directed. Instead, he filed the first of three motions

[1]The case has been to the Fifth Circuit twice on other matters. 415 F.2d 212 (1969). 452 F.2d 794 (1971).

for reconsideration of the court's order. Nonetheless, on July 26, 1972, the court granted counsel another 15 days in which to make a showing; failing which, "the claim for attorneys fees will be deemed waived." Finally, a claim was made by counsel, but only for the so-called "class aspects" of the litigation, as opposed to the now ancient reinstatement action of the individual plaintiff. The claim consisted of a demand for a punitive fee of Two and one-half million dollars for such action. The basis therefor ($2.50 per union member) was deemed improper and inappropriate by the court. Accordingly, the court exercised its own judgment and made an award based upon factors delineated in an order of August 25, 1972. Counsel responded by another motion contending that there was no basis for the award made, i.e. that the factors named by the court were insufficient. This motion was denied on September 26, 1972.

Presently counsel has moved for the court to hold a full-blown evidentiary hearing on the question of attorneys fees. The motion is denied.

First, the court has ruled that the decision to award as well as the amount of award rests in the discretion of the court. (See order of June 26, 1972). E.g. Milone v. English, 113 U.S. App. D.C. 207, 306 F.2d 814 (1962). Therefore, there is no "right" to any award.

Secondly, counsel has been granted at best two opportunities to make a proper showing to the court and has failed to do so. The presentation of a claim in such manner and form is typical of that employed in many cases involving attorneys fees, particularly when they are awarded in the exercise of

discretion rather than as a matter of right. Berkshire Mutual Ins. Co. v. Moffett, 378 F.2d 1007 (5th Cir. 1967); Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971). As yet, the court still has no knowledge of the time spent by counsel nor any of the subjective factors relied upon by him in connection with his work input. Under the court's order, the claim could be deemed waived. However, the court decided to make a reasonable award anyway.

Lastly and most importantly, in the federal court, oral testimony and evidence is not required or demanded to make an award of attorneys' fees. Thus, "the court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of testimony of witnesses as to value." (Emphasis supplied). Campbell v. Green, 112 F.2d 143(3)(4)(5th Cir. 1940); Bagby Land & Cattle Co. v. California Livestock Com'n. Co., 439 F.2d 315 (3,4)(5th Cir.1971). See also North Drive-In Theatre Corp. v. Park-In Theatres, 248 F.2d 232 (10th Cir. 1957).

For the reasons stated, this fourth and hopefully last post-judgment motion is denied.

IT IS SO ORDERED.

This the 29th day of September, 1972.

s/Sidney O. Smith Jr.
Sidney O. Smith, Jr.
United States District Judge

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1395

FRANKLIN NIX,

Plaintiff-Appellant-
Cross Appellee.

versus

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,

Defendants-Appellees-
Cross Appellants.

FRANKLIN NIX,

Plaintiff-Appellant-
Cross Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia

---

(November 17, 1971)

2-H

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal has to do with two suits filed in the Northern District of Georgia. In the first, Civil Action No. 10,463, filed pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USCA, § 401 *et seq.*, plaintiff sought to enjoin his expulsion from union membership and also claimed damages. The district court found that he had been unlawfully disciplined for making statements protected by the free speech provision of the LMRDA, 29 USCA, § 411 (a) (2). Injunctive relief was granted against the Local Lodge and the International Association of Machinists and Aerospace Workers (Grand Lodge). *Nix v. Fulton Lodge No. 2 of IAM*, N.D. Ga. 1967, 262 F.Supp. 1000. The question of damages was reserved.

Both the Local Lodge and the Grand Lodge appealed to this court. The decision below was affirmed in all respects except as to the application of the injunction to the Grand Lodge. We held that the District Court never acquired jurisdiction over the Grand Lodge by virtue of proper designation of the Grand Lodge as a defendant, service of process, or appearance. In reversing as to the Grand Lodge we held that Nix would be entitled, on remand, to amend to seek relief against the Grand Lodge. *Fulton Lodge No. 2 of IAM v. Nix*, 5 Cir. 1969, 415 F.2d 212, 220.

Accordingly, appellant Nix filed an amendment to his complaint in the district court adding the Grand

Lodge as a defendant. However, in the same amendment, he expanded the scope of the suit to allege wrongful discharge from his employment as Press Representative for the Grand Lodge and prayed for reinstatement to employment and other appropriate relief.

The defendants filed motions to dismiss the amended complaint, urging lack of subject-matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted under the LMRDA, or in the alternative, that the claims were barred by principles of *res judicata*. Thereafter, plaintiff filed a notice of dismissal of this amended complaint against the Grand Lodge, thus eliminating the claim for reinstatement to his job as Press Representative for the Grand Lodge and for damages against the Grand Lodge on account of the discharge. The Grand Lodge objected to the dismissal.

Meanwhile, some two months later, plaintiff filed the second suit, Civil Action No. 13,818. Count I of the complaint was addressed essentially to plaintiff's former employment with the Grand Lodge. He alleged wrongful, malicious, and wanton conduct in administering discipline under the IAM constitution which resulted in his discharge from employment and expulsion from union membership. In the way of relief he requested restoration to employment with the union, damages and counsel fees. This complaint contained a second count which sought declaratory and injunctive relief on behalf of all union members against the Grand Lodge's enforcement of Article L, § 3 of the

IAM constitution, on the ground that its provisions authorizing discipline of union members for false or malicious statements against other union members or officers are inconsistent with the free speech provisions of LMRDA, 29 USCA, § 411 (a) (2).

The district court overruled the Grand Lodge's objection to its dismissal from C.A. No. 10,463. Then as to Count I of C.A. No. 13,818, the court ruled that principles of collateral estoppel required judgment for the Grand Lodge on that count. As to Count II, the court over objection from the Grand Lodge, allowed the class action to be brought but narrowed the class. This count was then dismissed with permission granted to plaintiff to add it by amendment to C.A. No. 10,463.

It is plaintiff's position on this appeal that the district court erred in dismissing Count I in C.A. No. 13,818, and in narrowing the class in Count II as well as in dismissing it. The Grand Lodge complains in its cross-appeal of its dismissal in C.A. No. 10,463. This latter suit is now pending in the district court on the claim for damages against the local union. We affirm on the appeal and cross-appeal.

I.

We turn to Count I in C.A. No. 13,818 in which plaintiff sought restoration of his employee status and damages for discharge. The district court concluded that the controlling issues of fact surrounding plaintiff's dismissal from his employment with the Grand Lodge were determined adversely to plaintiff in a prior pro-

ceeding before the National Labor Relations Board which was affirmed by this court in *Nix v. NLRB*, 5 Cir. 1969, 418 F.2d 1001. This earlier determination was held to preclude recovery by plaintiff on Count I. We agree. See, *H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519*, 5 Cir. 1970, 429 F.2d 520; *Painters District Council No. 38 v. Edgewood Contracting Co.*, 5 Cir. 1969, 416 F.2d 1081.

II.

As to Count II of the C.A. No. 13,818, both plaintiff and the Grand Lodge take exception to the ruling of the district court. The Grand Lodge contends that no class action will lie on the free speech question presented in connection with Article L, § 3, of the IAM constitution. Plaintiff contends that the court erred in narrowing the class from all members of the Grand Lodge to only those members against whom the provision was being invoked.

On the authority of *Golden v. Zwickler*, 1969, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113, the district court determined that no justiciable "controversy" is present except where Article L, § 3 of the IAM constitution is being invoked against union members. For that reason the district court limited the class to such persons. We agree that only then would the judicial resolution be limited to "... concrete legal issues, presented in actual cases, not abstractions . . ." *United Public Workers of America v. Mitchell*, 1947, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754.

We conclude that there is no merit in either the appeal or cross-appeal as to Count II of the complaint. The cause of action asserted can be included by amendment to C.A. No. 10,463. Plaintiff will not be harmed by such a course and the district court was well within its case management discretion in the action taken. This leaves the matter in the posture where the district court can determine, in the event of amendment, as its order contemplates, whether the matter should proceed as a class action at all, depending on whether the requisites of Rule 23, F.R.Civ.P., are met.

III.

The last issue arises under the cross-appeal of the Grand Lodge wherein it is contended that the district court erred in permitting its dismissal by stipulation under Rule 41(a) (1), F.R.Civ.P.,[1] by plaintiff.

Although no answer had been filed, the Grand Lodge contends that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Rule 41(a) (1), should be considered motions for summary judgment which precluded dismissal under the Rule. These motions were based on four grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction; (3) a failure to state a claim upon which relief could be granted; and (4) *res judicata*.

---

[1] "(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
(1) By Plaintiff; by Stipulation. . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

No affidavits or other matters outside the pleadings pertinent to (3) or (4) above (motions filed pursuant to Rule 12(b) (6), F.R.Civ.P.), were submitted by the Grand Lodge so as to convert the motions into motions for summary judgment under Rule 56 as provided in Rule 12(b), F.R.Civ.P. By no stretch of the imagination can the Xerox copies of opinions of this court, attached to a memorandum of law submitted by the Grand Lodge in connection with the Rule 12(b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12(b) (6) motion into a motion for summary judgment. Cf. *Miller v. Reddin*, 9 Cir. 1970, 422 F.2d 1264.

The district court did not err in allowing the Rule 41 (a) (1) dismissal.

AFFIRMED.

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3582

FRANKLIN NIX,
Plaintiff-Appellant,

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(June 5, 1973)

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: Once again the dispute between Franklin Nix and the International Association of Machinists and Aerospace Workers has found its way to this court. This is the third appeal in this civil action. See *Fulton Lodge No. 2 v. Nix*, 5 Cir. 1969,

415 F.2d 212; *Nix v. Fulton Lodge No. 2*, 5 Cir. 1972, 452 F.2d 794. Furthermore, this court also considered one other action involving conflict between Nix and the IAM in *Nix v. National Labor Relations Board*, 5 Cir. 1969, 418 F.2d 1001. Hopefully our opinion today will lay to rest this spate of litigation.

The basic dispute underlying all of these lawsuits originates with Nix's unhappy period as an employee of the union. The case before the Labor Board related to a charge that Nix had been fired by the union solely because he was seeking to unionize the union's employees. This court upheld the Board's determination that the discharge was based on the theft by Nix of records and papers of IAM vice president Watkins, officer in charge of the southern territory for the union, and thus for good cause.

This present action was filed under the Labor-Management Reporting and Disclosure Act of 1959, seeking to enjoin his expulsion from union membership. The district court held that Nix had been improperly disciplined for making statements protected by section 101(a)(2) of the LMRDA, which guarantees freedom of speech to union members. The court granted injunctive relief against the Local and International, but reserved the question of damages. On appeal, 415 F.2d 212, we affirmed the trial court in all respects save the issuance of an injunction against the Grand Lodge (the International), holding that the district court had never acquired jurisdiction over that defendant. We specifically held that Nix would be afforded an opportunity on remand to amend and seek relief against the Grand Lodge.

Back in district court, Nix amended as suggested, but also added a separate claim relating to his dismissal from his job. Plaintiff then filed notice of dismissal of this amendment to the complaint. Approximately two months later plaintiff filed a second suit which alleged wrongful, malicious and wanton conduct in administering discipline which resulted in discharge from employment and expulsion from membership. In a second count of this new suit he sought declaratory and injunctive relief on behalf of all union members against the Grand Lodge, alleging that Article L, § 3 of the IAM Constitution which allowed discipline of union members for false or malicious statements against other union members or officers conflicted with the freedom of speech provisions of the LMRDA.

In straightening out this tangled web, the district court found Nix foreclosed on count one of his new suit because of the earlier Board and court determination that the discharge had been proper. As to count two of the new suit, the court dismissed it with permission to add it in lieu of the dismissed amended complaint in the original action. The court also narrowed the class to only those members against whom the union's constitutional prohibition was being applied.

All of these maneuvers were considered and affirmed by this court, 452 F.2d 794. We stated:

> The cause of action asserted can be included by amendment to [the original suit]. Plaintiff will not be harmed by such a course and the district court was well within its case manage-

> ment discretion in the action taken. This leaves the matter in the posture where the district court can determine, in the event of amendment, as its order contemplates, whether the matter should proceed as a class action at all, depending on whether the requisites of Rule 23, F.R.Civ.P., are met.
> *Id.* at 797.

Amendment was made below, and we are now faced with an appeal from the final disposition of this case.

At this point it becomes necessary to attempt to clearly delineate precisely what issues plaintiff is presenting to this court. The difficulty here is that the facts must be gleaned from a morass of pleadings and pre-trial conferences. The district court considered that the only claims by Nix were the questions of constitutionality of the provision to be determined as a class action and the awarding of any attorney's fees. All damage claims for Nix himself were clearly dropped at pre-trial conference. The court then proceeded to hold the disciplinary section of the IAM Constitution void because of conflict with the LMRDA. The court also ruled that reasonable attorney's fees would be allowed.

For purposes of this appeal, plaintiff appears to challenge only the court's conclusion that class damages had not been sought and that the attorney's fees which counsel for plaintiff were ultimately awarded were inadequate.

Damages for the Class

It is extremely difficult to understand exactly what plaintiff is seeking as damages for the class. In brief and in motions before the trial court he alleges that the term "all appropriate relief" encompassed a claim for class damages. Furthermore, he maintains that the district court was obligated to publish notice to all possible class members[1] and permit other class members to come into the suit and prove their own individual special damages. This would, of course, have, if there were as many possible claims as plaintiff alleges, resulted in a multiplicity of damage trials as each individual alleging injury would have to prove his right to be a member of the class by showing that the provision had been used against him and then prove the damages which followed from that application. As the union points out, actual discipline was imposed following hearing at the local level.

It is not clear from the documents in this case whether plaintiff ever adequately alleged a damage claim on behalf of all members of the class against the International. One thing, however, is clear, and that is determinative of this issue. The trial court in its pre-trial order and in its opinion clearly stated that the class claim was "fully one of law" and indicated that it would be considered on the declaratory and injunctive grounds only.

---

[1]Since the class was limited to those against whom this provision was being enforced, determination of the members of the class would be difficult although the plaintiff alleges notice could be given in the union's periodical.

Under Rule 23 of the Federal Rules of Civil Procedure, the prerequisites for a class action are spelled out in detail. Class actions are of three basic types with the requirements for each varying to some degree. It appears to this court that the district court was proper in limiting the class aspects to the single issue of law.

A reading of the district court's earlier order of November 16, 1970, wherein it considered a union motion to dismiss the class nature of the actions shows that the court envisioned permitting this suit under Rule 23(b)(2). The court stated that the class count of the complaint was "simply a claim that those same rights (and the rights of persons similarly situated) are violated by the existence and threatened application of that provision of the Union constitution." This is thus properly a class action within Rule 23 (b)(2) which allows such actions when:

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Since the district court made none of the findings required for maintenance under Rule 23(b)(3), it is obvious that the suit was being allowed to proceed as a class matter under Rule 23(b)(2).

Originally, it was thought suits for money damages would not qualify under (b)(2). See Advisory Commit-

tee Note, 39 F.R.D. 98, 102. However, several courts have allowed class damage actions in appropriate cases. *Robinson v. Lorillard Corp.*, 4 Cir. 1971, 444 F.2d 791; *Almenares v. Wyman*, D.C.N.Y. 1971, 334 F.Supp. 512, and other cases cited in Wright & Miller, *Federal Practice and Procedure:* Civil § 1775, note 31. However, we are not faced with a case where the district court treated damage claims as part of the class action and wholly different considerations apply.

A district court is given broad discretion in controlling class actions because of the managerial difficulties which may develop. Section (c)(4) of Rule 23 specifically states: "When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues . . .". This clearly means that the district court may take only those parts of a lawsuit which lend themselves to convenient use of the class action motif. Problems which may develop "after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate sub-classes or to require the members to bring individual suits for damages." *Eisen v. Carlisle & Jacquelin*, 2 Cir. 1968, 391 F.2d 555.

Very instructive on this issue are the views of those scholars generally regarded as currently the leading commentators on the Federal Rules:

> Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor repre-

> sent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b) (2). Those aspects of the case not falling within Rule 23 (b) (2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23 (b) (1) or Rule 23 (b) (3) and may be heard on a class basis. Even when this is not the case, the action should not be dismissed. The court has the power under subdivision (c) (4) (A), which permits an action to be brought under Rule 23 "with respect to particular issues" to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damages issues to be tried separately. (footnote omitted).
>
> Wright & Miller, *Federal Practice and Procedure*: Civil § 1775.

Here there seems no doubt that the primary relief sought was injunctive and declaratory and that the concept of class damages (without any individual injury being shown) would be highly speculative.

Nix had waived all questions of damages on his individual claim. Nix knew of no other parties who might have been injured, although he alleged several unnamed parties. It seems eminently clear that because of the differing nature of each individual possible claim, the problem involved in proving separate dam-

ages, and the fact that the only common question involved here was the legal question of the validity of the constitutional provision, the district court wisely used its discretion to limit the class aspects to the declaratory action.

Therefore, we hold that it was within the trial judge's discretion to limit the class aspects of this case to the question of the validity of the constitutional provision.

Attorney's Fees

The only controversy presented in this appeal over the amount of attorney's fees awarded counsel for plaintiff Nix is his claim that they were grossly inadequate. The union has not challenged their awardance nor the amount. The district court awarded fees in the amount of $3,000.00. We affirm this determination.

The application by plaintiff's counsel for attorney's fees is somewhat unique. The amount claimed is $2,500,000.00. The supporting brief on this figure shows that it was computed by multiplying $2.50, the amount collected monthly by the Grand Lodge from each member, times the approximate total membership of the union, one million. The rest of the request reads very similar to a petition for punitive damages. Plaintiff's attorney appears to be of the opinion that *he* should be *personally enriched* because the union has used sanctions against its membership which conflict with an act of Congress and because he feels it would be socially desirable to punish this union. This has never

been the rule in this circuit and we are confident that it never will be. Were punitive damages to be allowed or available in an action such as this they certainly should go to injured parties, not directly to the attorney.

As a legal matter, the arguments made by counsel supporting this figure are thoroughly unconvincing. Primary reliance is placed upon *Ratner v. Bakery and Confectionery International Union*, D.C. Cir. 1965, 354 F.2d 504. In *Ratner* the court clearly indicated that the award of attorney's fees was based on *quantum meruit*. On an earlier appeal of the *Ratner* case, 335 F.2d 691, the circuit court had indicated that the district court should not be restricted to figuring attorney's fees on the basis of a fee schedule which had been originally entered with the plaintiffs and to which the International was not a party. At that time the court indicated that the award should be based on a *quantum meruit* theory and suggested that the district court take into account the value of the benefit to the International and its membership from the services. The amount actually awarded by the trial judge on remand in *Ratner* was extremely close to the amount requested by the attorney based on the fee schedule. The Court of Appeals upheld this as within the court's discretion. Any reasonable reading of the *Ratner* opinions show that they are not applicable to the claims of this attorney.

Here, despite repeated requests, plaintiff's attorney failed to supply any information on time spent in the preparation and handling of the class aspects of this

case. The trial court in this case therefore based its award on its own knowledge of the proceedings:

> In this case, the issue upon which counsel obtained relief arose long after the original trial of the private plaintiff's case. There has been no trial time and, so far as the court knows, no time spent in discovery procedures on this issue. The question was presented by amendment to the pleadings and on brief plus the celebrated short conference with the court. Attorneys' fees in such cases are deemed by the court to be compensatory and not punitive in nature.

Our consideration of the record in this case leads us to the conclusion that the district court was well within its discretion in setting attorney's fees at $3,000.00. We note that counsel for the plaintiff has not presented this court or the district court at any time with a statement of work done on this case. He has apparently been satisfied to rest his claim for attorney's fees on his allegations of social desirability which we clearly reject above.

Therefore, the opinion of the district court in this case is, in all respects

AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-363

FRANKLIN NIX,

Petitioner

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

WILLIAM G. McRAE
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IN THE

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari

---

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Comes now Franklin Nix, within 25 days from the date of the order denying his petition for a writ of certiorari entered on November 12, 1973, and respectfully petitions the Court for a rehearing of his

petition for writ of certiorari in the above stated case, because of intervening circumstances of substantial or controlling effect with respect to the record certified and transmitted to this Court by the clerk of the court below, contrary to the provisions of Rule 21 (1) and (2) of the Rules of the Supreme Court.

Rule 21 (1) and (2) read as follows:

> "1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

> "2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests. The provisions of Rule 12 (3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari."

The petition for writ of certiorari was docketed in this Court on August 28, 1973. On September 22, 1973, petitioner's counsel wrote a letter to the clerk of the court below requesting him to certify and transmit parts of the record to this Court and a copy of said request was sent to counsel for respondent. Instead of complying with said request said clerk by letter to petitioner's counsel, dated September 25, 1973, stated:

> "Under revised Rule 21 (1) of the Supreme Court effective July 1,

> 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office. 38 LW 3502."

On September 28, 1973, petitioner's counsel wrote another letter to said clerk requesting that he certify and transmit parts of the record to this Court, and sent a copy of said request to counsel for respondent. Copies of this correspondence were sent to the clerk of this Court with a letter of transmittal on September 28, 1973, by counsel for petitioner. Neither the respondent nor the clerk of this Court, so far as petitioner or his counsel is informed, requested the clerk of the lower court to certify and transmit additional parts of the record to this Court.

It was the duty of the clerk of the court below under Rule 21 (2) to certify and transmit only those parts of the record requested by counsel for petitioner, in the absence of a request to him by respondent or the clerk of this Court that additional parts of the record be certified and transmitted to this Court.

Instead of complying with the request of counsel for petitioner to certify and transmit only those parts of the record specified, the clerk of the lower court

wrote a letter to the clerk of this Court, dated October 17, 1973, transmitting several volumes as the certified transcript of record, and which stated falsely that they were sent "Pursuant to the request of counsel for petitioner".

On October 22, 1973, counsel for petitioner wrote a letter to the clerk of this Court, a copy of which was sent to the clerk of the lower court, in which counsel stated:

> "The letter to you from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated October 17, 1973, again shows a failure to certify and provide for the transmission to the Supreme Court of only certain parts of the record in that court, as specified in my request to him."

Petitioner respectfully urges that the clear violation of this Court's rules by the clerk of the lower court in the certification and transmittal of the record to this Court on his petition for a writ of certiorari, is of sufficient gravity and importance as to require the exercise of this Court's power of supervision to enforce its own rules designed to insure fairness to litigants who rely upon such rules in seeking a review.

Counsel seeking a review are not unmindful of the statistics that reveal the grant of review by this Court of approximately 250 cases out of approximately 4000 applications for review filed annually.

All lawyers have been informed by members of this Court of its work load, and of the limited time it can devote to an application for review. Counsel seeking a review, which depends wholly upon the Court's discretion, are advised by its rules that only those parts of the record deemed essential to a determination of whether a case should be reviewed on its merits should be certified and transmitted to this Court. Counsel for petitioner requested that only parts of the record he thought essential to such determination be certified and transmitted.

The record sent to this Court by the clerk of the lower court does not contain the "Brief for Plaintiff with attachments, filed March 1, 1972" in the district court, which petitioner's counsel requested the clerk of the lower court to certify and transmit to this Court. This brief was omitted from the printed record in the court below but was filed therein in its original form. On page 5 of said brief we said:

> "When the court declares the constitutional provision here

> in controversy to be of no force or effect with respect to union members within the United States, it would be appropriate for the court"

to grant injunctive relief, award attorney's fees and expenses of this litigation, and money damages. Such further relief petitioner was entitled to seek for himself and other members of the class, based upon such declaratory judgment, when granted, under 28 U.S.C. § 2202. Edward B. Marks M. Corp. v Charles K. Harris M. P. Co., (2nd Cir. 1958) 255 F. 2d 518, 522, cert. denied 358 U.S. 83)

The court below erroneously held that "All damage claims for Nix himself were clearly dropped at pre-trial conference." (App. 123) The pre-trial order of January 21, 1972, made no reference to Nix's claim for damages against respondent Grand Lodge. The only reference to damages in said pre-trial order reads:

> "The above case is again before the court for consideration of plaintiff's claims under his right to amend, and his claim for damages against the local union for his expulsion from membership. Plaintiff's counsel states that plaintiff abandons his claims for damages against the local union." (emphasis supplied)

The amendment setting up the class claims was filed subsequent to the entry of said pre-trial order, which granted petitioner's right to amend. The amendment was filed February 8, 1972 pursuant to the terms of the pre-trial order. The pre-trial order did not preclude petitioner from seeking all appropriate further relief for himself and other members of the class based upon the declaratory judgment subsequently granted.

Petitioner contends that the failure of the clerk of the court below to perform his duty under Rule 21 (2), as hereinbefore pointed out, and his certification and transmission of an unauthorized record to this Court in violation of said Rule, are intervening circumstances since the docketing of the case of substantial or controlling effect in influencing this Court to deny the petition for a writ of certiorari in this case.

Petitioner respectfully requests the Court to grant a rehearing of its order denying the petition for a writ of certiorari, entered November 12, 1973, and that the Court prior to action on the petition, require the clerk of the court below to certify and transmit to this Court only those parts of the record specified in petitioner's request of September 28, 1973, and that the Court upon such rehearing

grant the writ of certiorari.

Respectfully submitted,

William G. McRae

Attorney for Petitioner

Address:

608 Lakeshore Drive, N. E.
Atlanta, Georgia 30307

CERTIFICATE OF COUNSEL

I, William G. McRae, counsel for petitioner Franklin Nix, hereby certify that the above and foregoing Petition for Rehearing of Order denying Petition for a Writ of Certiorari is presented in good faith and not for delay. I also certify that the petition is restricted to intervening circumstances of substantial or controlling effect which have intervened since the docketing of the petition for a writ of certiorari in this Court.

This 28th day of November, 1973.

William G. McRae
Counsel for Petitioner

PROOF OF SERVICE

I hereby certify that I have this day served three printed copies of the above and foregoing petition upon the respondent by depositing same in a United States post office, with air mail postage prepaid, addressed to Bernard Dunau, 912 Dupont Circle Building, N. W., Washington, D. C. 20036, Lead Counsel for respondent, and that all parties required to be served have been served.

This _____ day of December, 1973.

_____

William G. McRae
Counsel for Petitioner